

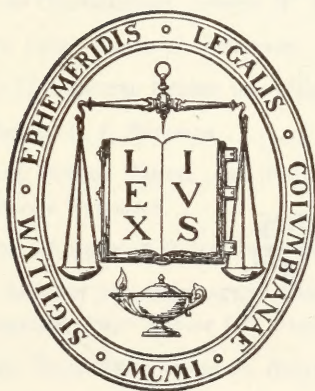


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WAR POWERS IN THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA.

INTRODUCTORY.

Between the federal systems of the United States of America and the Commonwealth of Australia there are many points of difference, as he who runs may see; but the elements of similarity are so notorious and so essential that a consideration of the war growth and war working of the Australian Constitution may not be without interest to American jurists.

The Commonwealth of Australia Constitution Act, 1900,¹ is in many ways remarkable. In form an ordinary enactment of the Imperial Parliament, it is really the refined product of years of co-ordinated Australian research. Long deliberation resulted in a definite choice. The constitution builders had before them the systems of Canada, of Switzerland, of the United States, and of Germany, and they chose the American system in preference to all others. That they have in many ways departed from their model is apparent to anyone who studies the two constitutions. The Constitution of the United States lays down a long list of private rights; it manifestly distrusts Congress; in the setting up of a non-parliamentary executive it definitely diverges from the British system of cabinet government. The Australian Constitution, on the other hand, clearly contemplates the cabinet system;² it says little of private rights; above all it is an imperial act, recalling the mind to the ultimate authority of the Crown. It is an agreement of the people and of the states, but it is not in form a popular declaration and ordainment as is the Constitution of the United States.

But despite this, the two constitutions are alike in great and important features. They are both federal in the truest sense;

¹63 & 64 Vict. c. 12.

²63 & 64 Vict. c. 12, § 64.

they both confer specific functions on the federal body, while reserving the general residue to the states; there is, finally, a striking similarity of terminology which cannot fail to impress even the most casual reader.

This similarity has had important consequences in the interpretation of the Australian instrument. The Commonwealth High Court has taken judicial notice of the fact that one constitution is modeled largely on the other, and has accordingly given a very special weight and authority to the judicial decisions and doctrines that have grown up round the terms of that other. As Griffith, *C. J.*, said in delivering the judgment of the Court in *D'Emden v. Pedder*:³

"When * * * we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation."

In accordance with this declaration, the High Court adopted the doctrine of the immunity of instrumentalities as laid down by Marshall, *C. J.*, in *M'Culloch v. Maryland*.⁴ The historic controversy with the Privy Council resulted. In *Webb v. Outrim*,⁵ we find Halsbury, *L. C.*, saying:

"It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation."⁶

In *Baxter v. Commissioners of Taxation*,⁷ the Australian Chief Justice vigorously replied, and it is submitted that his position has been substantially vindicated by certain *dicta* of Haldane, *L. C.*,

³(1904) 1 Commw. L. R. 91, at p. 113.

⁴(1819) 17 U. S. 316.

⁵[1907] A. C. 81, at pp. 90-91.

⁶A. Berriedale Keith in his book "Responsible Government in the Dominions", Vol. 2, at page 835, criticizing the High Court attitude, says: "that a Constitution granted by the Imperial Parliament should be interpreted by the principles of the rigid Constitution of the United States is a result which legally is certainly unsound."

⁷(1907) 4 Commw. L. R. 1087.

in delivering the judgment in the Colonial Sugar Company's case.⁸ There is an important admission contained in the words:

"In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada."

This question of similarity has far more than a merely academic interest; for on it will depend much constitutional law, and on account of it Australian war legislation and war interpretation become, to Americans, something more than the local doings of a distant state. The United States is now, like Australia, involved in a great world-war. Its constitutionalists are beginning to ask themselves how far the powers of their federal government are going to be sufficient. Australians have been asking this question for three years, and the answer provides some extremely interesting reading.

THE WAR POWERS.

The defence powers of the Commonwealth are found in several sections of the Constitution. The relevant ones are:

"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to:—" (*inter alia*)

"(i) Trade and commerce with other countries and among the States:

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(xix) Naturalization and aliens:

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and

⁸Att'y.-Gen'l. v. Colonial Sugar Refining Co. [1914] A. C. 237, at p. 254.

extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force * * *.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

Upon these powers the Commonwealth has, during the present war, erected a considerable structure of legislation and regulation of an emergency character. Always recognized as having plenary authority within the ambit of its designated functions," the present crisis has clearly shown two attributes possessed by the Commonwealth Parliament—its comparative immunity from imperial interference, and the immense superiority of commonwealth over state powers. In this connection Americans should remember that in the Australian federal system the Crown is an integral part, and the British Parliament can at any time extend the operation of its acts to Australia; and also that:

"The State Parliaments indeed enjoy a position of independence unknown to the State Legislatures in the United States or to the Provincial Parliaments in Canada."¹⁰

The second feature, the independence of the states, has perhaps been thrown into shadow by the war necessity of a central controlling authority; the result, as will be shown, has been a substantial departure from the respect previously shown to states' reserved rights. So far as the other matter is concerned, a fact previously adverted to must be borne in mind; the Australian Constitution is an act of the British Parliament, dependent for its effective force on the legislative power of Great Britain. In the Constitution of the United States it is "THE PEOPLE" who "ordain and establish this Constitution". In other words the United States of America is a sovereign nation containing *in itself* full governmental powers; Australia is a Commonwealth whose powers are, and have repeatedly been declared to be, complete within the limits prescribed,

⁹Hodge v. The Queen (1883) 9 App. Cas. 117.

¹⁰Moore, Constitution of the Commonwealth (2nd ed.) 342.

but subject at all times to imperial legislation. The Commonwealth Parliament has been given a legislative function, but above it there always stands the British Parliament which is supreme, and whose laws are paramount.

For purposes of comparison, it may be noted that the defence or war powers of the United States government are contained in the provision making the President commander-in-chief, and the grant to Congress of powers—

“To levy and collect taxes * * * to * * * provide for the common Defence and general Welfare of the United States; * * * To declare War * * *; To raise and support Armies * * *; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * * and, To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹¹

It will be seen then that the last clause, like section 51 (xxxix) of the Australian Constitution, provides for a certain incidental power; the importance and possible scope of this must be looked at in the next section.

WAR EMERGENCY LEGISLATION.

It might have been expected, in a war like the present which shakes the British Empire to its very foundations, that the war legislation of the Imperial Parliament would be given an imperial operation. But such is not the case. The British Defence of the Realm Acts (on which the Australian War Precautions Act 1914-1916,¹² is largely based) are of local operation merely. The colonies—such is the recognition accorded to their privileges of self-government—have been conceded the fullest discretion in the carry-

¹¹United States Constitution, Art. 1, § 8.

¹²14 Commw. Acts 134.

ing out of their war measures. From an enumeration of the defence powers of the Commonwealth, it will be readily seen that the Federal Parliament has a sharply defined province. On the one side, it may impinge on the imperial powers; on the other, it may come into conflict with those powers which are still the guarded privileges of each of the Australian states. Remembering this restriction of sphere, remembering in particular that the states, broadly speaking, retain control over their internal affairs and internal trade,¹⁸ how very wide are the terms of the War Precautions Act 1914-1916, enacted by the Commonwealth Parliament. The citation of a few sections will show this clearly:

"4.—(1.) The Governor-General may make regulations—

(i.) for securing the public safety and the defence of the Commonwealth * * *

"(1. A.) The Governor-General may make regulations as he think desirable for the more effectual prosecution of the war, or the more effectual defence of the Commonwealth or of the realm, prescribing and regulating—" (*inter alia*)

"(b) the condition (including times, places, and prices) of the disposal or use of any property goods articles or things of any kind * * *."

While in form the grant of power is to the Governor-General, this indicates no personal authority in the King's representative; it is committed to him as the constitutional head of the government and is exercised by the cabinet, which is thus given a comprehensive discretion in the making of regulations which may assist the public safety and the defence of the Commonwealth. In consequence, many regulations have been promulgated, dealing with a host of matters closely or distantly related to the ends stated. These will be considered in the next section, but the question which immediately suggests itself is this—"are there to be no limits to the defence power save those which the executive in its discretion may choose to invent? The public safety may be secured in many ways, social and industrial as well as military or naval; are these matters, then, in time of war, to be considered either a part of or 'incidental' to the powers conferred?"

¹⁸This is the true *discrimen* in *The King v. Barger* (1908) 6 Commw. L. R. 41 and *Peterswald v. Bartley* (1904) 1 Commw. L. R. 497.

Dr. Willoughby has an observation of importance at this stage. He says:¹⁴

"The declaration in the Preamble that the new Union is established" (he is of course referring to the United States) "for the common defense and general welfare, and the grant by Article 1, Section 8, of the Constitution to Congress of the power 'to levy and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States,' has at times been argued to be equivalent to a grant to the General Government of all powers, the exercise of which may in any way contribute to the effectuation of either of these ends.

* * * * *

It scarcely needs to be said that this interpretation has not been accepted by the courts. Were this view to be accepted the Government of the United States would at once cease to be one of enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced."

It would perhaps be scarcely justifiable to say that the opinion of things here dismissed by Dr. Willoughby has been arrived at in Australia; but how very nearly it has been approached is evidenced by the decisions of the High Court, more particularly in *Marey v. Burvett*.¹⁵ This, and other decisions, will be looked at later.

As illustrations of other legislation of a war character passed by the Commonwealth Parliament, there may be mentioned the Trading with the Enemy Act 1914-1916,¹⁶ the Enemy Contracts Annulment Act 1915,¹⁷ which is largely, however, declaratory of the common law, the Daylight Saving Act 1916,¹⁸ and the Unlawful Associations Act. 1916.¹⁹ These last two mentioned are indexed in the current sessional volume of statutes as emergency acts passed under section 51 (vi) of the Constitution, and are curious examples of what things "defence" may cover. Daylight saving is a means to the end of national economy and efficiency, and as such may be reckoned a factor in the successful carrying on of national war. The Unlawful Associations Act 1916, creates a new crime, that of

¹⁴1 Willoughby, Constitution, § 22.

¹⁵(1916) 21 Commw. L. R. 433.

¹⁶14 Commw. Acts 107.

¹⁷13 Commw. Acts 105.

¹⁸14 Commw. Acts 76.

¹⁹14 Commw. Acts 77.

advocating or encouraging, or inciting or instigating to the taking or endangering of human life, or the destruction or injury of property. The causes for its enactment are stated in the preamble:

"Whereas an Association known as the Industrial Workers of the World and members thereof have been concerned in advocating and inciting * * *:

And whereas it is expedient for the effective prosecution of the present war that laws shall be enacted for the suppression of such practices:"

I must here observe that the Commonwealth has no general power of criminal legislation; the protection of property, the control of production and domestic trade, and the maintenance of public order—these and all similar functions are part of the province of the states. The Commonwealth can probably only deal with offenses against some law passed in pursuance of one of its defined powers.²⁰ This new offense, then, is one of the offspring of the defence power. The readiness with which its legitimacy is accepted is emphasized by the fact that there were not wanting distinguished authorities in Parliament for the proposition that a War Precautions Act could have validly achieved the same end.²¹

Of the wide field covered by the War Precautions Act 1914-1916, and also of the possible range of matters incidental to those of the "naval and military defence" of the Commonwealth, these instances may serve as some illustration.

COMMONWEALTH REGULATIONS.

There is no more common phase of development in modern constitutional law than the delegation of powers to the executive. The validity of such a delegation is upheld in Australia, because the Commonwealth has plenary authority within the limits of its powers, and this includes a capacity of delegation.²² The maxim *delegatus non potest delegare* has no application to a government which is itself no delegate.²³ The position may be different in

²⁰In my opinion the power of the Commonwealth Parliament to enact criminal laws is to be found in pl. xxxix. and nowhere else, and is a power to enact them as sanctions to secure the observance of substantive laws with respect to matters within the legislative, administrative, or judicial power of the Commonwealth, and in that sense incidental to the execution of such powers." *The King v. Kidman* (1915) 20 Commw. L. R. 425, *per Griffith, C. J.*, at p. 434.

²¹Federal Hansard 10121, 10145.

²²*Hodge v. The Queen*, *supra*, footnote 9.

²³*Baxter v. Ah Way* (1909) 8 Commw. L. R. 626.

America, for there it is "WE, THE PEOPLE of the United States * * * do ordain and establish this Constitution for the United States of America." The people, the legal sovereigns, have constituted a delegate body, and it may therefore be that that delegate cannot in turn delegate to any other body or authority. But the Australian Commonwealth Parliament, being no delegate, may and does hand over to the executive a certain legislative power. This handing over has been substantial during the present war; under the War Precautions Act 1914-1916, as we have seen, the executive has been given practically a free discretion in the devising of new modes of protecting the public safety of the Commonwealth. This fact of itself is notable, for it is characteristic of the Australian Constitution (as also of the American) that it provides for a division of powers; the spheres of the legislature, the executive and the judicature are clearly marked out;

"it is impossible to avoid the conclusion that the separation of powers was intended to establish legal limitations on the powers of the organs of government, and that the Courts are required to address themselves to the problem of defining the function of those organs."²⁴

But perhaps the most interesting feature is not the constitutionality of delegation *per se*, but the immense range of subjects upon which the delegated powers may be made operative. The bestowal on the executive of a power of decision over administrative details is one matter; the handing over to the executive of a virtual power of determination of the whole governmental policy is quite another. The validity of such a transfer might possibly be doubted in the American system,²⁵ but since *Lloyd v. Wallach*²⁶ and *Farey v. Burvett*²⁷ at any rate, it has come to be tacitly accepted as *intra vires* in Australia. It is perhaps the recollection that all these executive powers, however seemingly arbitrary, rest in the last resort on Parliamentary authorization (added to the constant responsibility of the executive under the cabinet system), that reconciles constitutionalists to the temporary disturbance of

²⁴Moore, *op. cit.*, 96-97. "A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government." Willoughby, *op. cit.*, 1259.

²⁵Field v. Clark (1892) 143 U. S. 649, 12 Sup. Ct. 495.

²⁶(1915) 20 Commw. L. R. 299.

²⁷*Supra*, footnote 15.

the traditional constitutional balance. Be that as it may, the War Precautions Regulations contain some striking examples of what may conceivably, in a time of national peril, be related to the defence power.

"The competent naval or military authority * * * shall have right of access to any land or buildings or other property whatsoever."²⁸ Premises licensed for the sale of intoxicating liquor may be closed by the proper authorities in certain areas.²⁹ Inhabitants of any particular area may be ordered to leave that area.³⁰ "A person shall not converse with any other person by telephone in any other than the English language."³¹ A censorship of the press is established.³² The price of sugar is fixed.³³

A moratorium both for civilians and soldiers has been established.³⁴ The use or sale of crude tar save by consent of the Minister is prohibited.³⁵ Restrictions and conditions are imposed on the registration of companies, firms or societies.³⁶ Enemy shareholders in companies have been compelled to transfer their shares to a public trustee.³⁷ Power is taken to prohibit the purchase or sale of hides in certain cases.³⁸ Contracts for the sale of any land to naturalized persons of enemy origin must not be entered into save by the consent of the Attorney-General.³⁹ Restrictions are placed on the acquisition of interests in mining ventures by persons other than natural-born British subjects.⁴⁰ A Prices Board is established, and on its recommendation the Minister may "determine the maximum prices which may be charged for foodstuffs and necessary commodities sold, and the maximum rates which may be charged for services the performance of which is commenced, in any proclaimed area".⁴¹ For the rest, there are regulations concerning rabbit skins, sheep skins, tin plates, wool, the use

²⁸W. P. R. 1915 (War Precautions Regulations 1915) No. 5.

²⁹W. P. R. 1915 No. 12 (1).

³⁰W. P. R. 1915 No. 15.

³¹W. P. R. 1915 No. 21A.

³²W. P. R. 1915 No. 28.

³³W. P. R. 1915 No. 49E.

³⁴W. P. (Moratorium) R. 1916.

³⁵W. P. (Coal Tar) R. 1916.

³⁶W. P. (Companies) R. 1916.

³⁷W. P. (Enemy Shareholders) R. 1916.

³⁸W. P. (Hides) R. 1916.

³⁹W. P. (Land Transfer) R. 1916.

⁴⁰W. P. (Mining) R. 1916.

⁴¹W. P. (Prices) R. 1916, 13 (a).

in trade of such words as "Anzac";⁴² actions for libel or slander by persons alleged to be enemy subjects are made contingent on certain consents;⁴³ the raising of patriotic funds is forbidden without the sanction of a State War Council.⁴⁴ In one case, consequent on the great coal strike of 1916, power was given to the Prime Minister to convene a compulsory conference of employers and employees.⁴⁵

These illustrations show clearly enough to what very wide boundaries the new executive power of the Commonwealth extends. With the exception of the telephone (and possibly companies) none of the matters dealt with by the regulations cited are within the general competence of the Commonwealth legislature—they are all matters which have become related to defence by reason of the war and its emergencies. Again, matters which are in the ordinary course civil become clothed with a military character; the result is the widening of the area of jurisdiction of courts martial, and the abrogation (as in the regulation discussed in *Lloyd v. Wallach*⁴⁶) of some of those rights of the subject which, though not expressed in the Australian Constitution as they are in that of the United States, are still the great common-law inheritance of each of the Australian states. War brings its own circumstances and its own peculiar necessities, and one of those necessities has been the power in some authority to control the thousand and one *minutiae* which may prove conducive to military success. The bare power of defence has attracted to itself, in the guise of "powers incidental", much that is not of itself military in character at all. As was said in *Ex parte Milligan*,⁴⁷ in discussing the war power of Congress:

"It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success * * *.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise."

⁴²W. P. (Supplementary) R. 1916 No. 2.

⁴³W. P. (Supplementary) R. 1916 No. 7.

⁴⁴W. P. (Supplementary) R. 1916 No. 13.

⁴⁵W. P. (Supplementary) R. 1916 No. 21.

⁴⁶*Supra*, footnote 26.

⁴⁷(1866) 71 U. S. 2, at p. 139

It seems a reasonable thing to say that in Australia today the "auxiliary powers", the "powers incidental" to the naval and military defence of the Commonwealth, have extended into the domain of states' rights, and that the functions of the executive have become if anything more important than those of the body which delegated those functions to it.

JUDICIAL INTERPRETATION.

The whole question of the extent of the defence power was raised and discussed in *Farcy v. Burvett*.⁴⁸ By a regulation made in pursuance of the War Precautions Act 1914-1916,⁴⁹ the retail price of bread and flour was fixed in certain proclaimed areas, this interference with the domestic powers of the states being justified as a means to the more effectual prosecution of the war. The validity of the regulation was attacked on three main grounds:

1. That "whatever the defence power may include which directly tends towards a successful prosecution of an existing war, it does not include all the powers the exercise of which may promote among citizens conduct which is conducive to what is called national efficiency."⁵⁰

2. That extending the defence powers to include measures which are merely conducive to the naval and military defence of the Commonwealth in an indirect way is tantamount to the destroying of all constitutional limitations in time of peace as well as in time of war. "If in time of war it is within the power of the Parliament to fix prices of commodities because Parliament thinks that to do so is necessary for the defence of the Commonwealth, it is also within the power of Parliament in time of peace to fix prices if it thinks that in view of possible future war it is necessary for the defence of the Commonwealth to do so."⁵¹

3. That the reserved powers of the states must be respected, and the regulation of internal trade is their domain.

The Court (Griffith, C. J., Barton, Isaacs, Higgins and Powers, JJ., with Gavan Duffy and Rich, JJ., dissenting) upheld the validity of the act and the regulation. In the opinions of the majority, great reliance is placed on the decision of Marshall, C. J., in *M'Cul-*

⁴⁸*Supra*, footnote 15.

⁴⁹See also section 4 (1. A.) (b) of the act quoted at p. 6, *supra*.

⁵⁰21 Commw. L. R., at p. 435.

⁵¹At pp. 434-435.

loch v. Maryland.⁵² Indeed, that decision, constantly adverted to as it has been by the High Court of Australia both in connection with the doctrine of the immunity of instrumentalities and the doctrine of implied powers, on this occasion received possibly its widest modern application. Griffith, *C. J.*, though normally considerate of state privileges, takes his stand at section 51 (vi) of the Australian Constitution and frankly applies Chief Justice Marshall's test:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁵³

He sees in the defence power a paramount power, over-riding state powers if they come in its way. To him "naval and military" are words of extension and not of limitation. The possibility of price-fixing being conducive to defence is all that he is concerned with; the "degree of its necessity" is a matter for Parliament to decide.

Barton, *J.*, also:—

"To aid in supplying the food-needs of any part of the Empire outside Australia or of Australia herself may greatly assist that Empire's defence, especially, but not only, when that supply may be used for the feeding of armies of which at this moment Australia forms an active part."⁵⁴

To Isaacs, *J.*,

"The defence power * * * becomes the pivot of the Constitution, because it is the bulwark of the State.

* * * * *

The essential fact is that Australians are belligerents as well as citizens, and for the moment their character as belligerents is pre-eminent and must receive the first consideration."⁵⁵

The Chief Justice, whose view of the meaning of "defence" is typical of that of the whole of the majority justices, defines that term as including,

"all acts of such a kind as may be done in the United Kingdom, either under the authority of Parliament or

⁵²*Supra*, footnote 4.

⁵³17 U. S., at p. 421.

⁵⁴21 Commw. L. R., at p. 448.

⁵⁵At pp. 453, 454.

under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution.

* * * * *

It includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy."⁵⁶

He thus adopts a wide interpretation of the defence powers; he recognizes also that acts may be included in "defence" in time of war which have no connection with defence in time of peace; he further refuses to enter into any enquiry as to the facts warranting the exercise of this branch of the legislative power.

The dissenting justices, Gavan Duffy and Rich, *JJ.*, construe the words "naval and military defence" much more strictly:

"We venture to think that they extend to the raising, training and equipment of naval and military forces, to the maintenance, control, and use of such forces, to the supply of arms, ammunitions and other things necessary for naval and military operations, to all matters strictly ancillary to these purposes, and to nothing more."⁵⁷

They deny the analogy with English conditions:

"The words 'the public safety and the defence of the realm' " (as used in the English Royal Proclamations) "are very different from the words 'the naval and military defence of the Commonwealth': the one phrase clearly suggests defence by means of naval and military operations, while the other is as broad and general as could be devised for the purpose of embracing all means for securing the safety of the community."⁵⁸

American students of Australian constitutional growth will be by now quite familiar with the sharp divergence in point of view between the senior judges of the High Court, Griffith, *C. J.*, and Barton, *J.*, and their immediate juniors, Isaacs and Higgins, *JJ.*⁵⁹ But, during a time of war at least, it would now appear that the former judges are prepared to look not so much at the rights

⁵⁶At pp. 440, 441.

⁵⁷At p. 465.

⁵⁸At p. 466.

⁵⁹*Cf.*, 2 A. Berriedale Keith, *op. cit.*, 840, commenting on the decision in *The King v. Barger*, *supra*, footnote 13, in which Isaacs and Higgins, *JJ.*,

and privileges of state powers as at the necessity for the centralizing in some authority of a comprehensive power to safeguard the public welfare in time of crisis. It may be added that some sanction for the view thus recently adopted by the High Court is found in the statement of Lord Parker in *The Zamora*.⁶⁰

“Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.”

One point of view which is suggested by the cases cited is this: that the defence power is *sui generis*—something different from the other powers in that it draws to itself all matters which the legislature and executive may choose to impute to defence. But clearly, however much necessity may enlarge these powers, they are also limited by necessity. In effect, any power which may be conducive to the safety of the realm or the good conduct of the war is, for the period of the war at least, a Commonwealth power. The English Defence of the Realm Act has not been without its able constitutional critics.⁶¹ It is, therefore, a noteworthy fact that an act of like character has in Australia been passed by a Parliament, not of absolute and sovereign, but of definitely enumerated powers.

On the validity of the War Precautions Regulations the leading authority is now Wallach's case.⁶²

Regulation 55 (1) of the War Precautions Regulations 1915 provides that:—

“Where the minister has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war.”

One Wallach, a naturalized person, was committed, and sued out

dissented from the judgment of Griffith, C. J., O'Connor and Barton, JJ., says: “The two dissenting judges * * * maintained that the true mode of viewing the question was not to assert the doctrine of implied prohibition, but to construe the powers granted to the Commonwealth in as full a manner as if the Commonwealth Parliament were that of a unitary state. The powers of the states were the residual power remaining after the powers of the Commonwealth had been ascertained, and the possibility of the misuse of a legislative power was no argument against its existence * * *.”

⁶⁰[1916] 2 A. C. 77, at p. 107.

⁶¹See Baty and Morgan, *War: Its Conduct and Legal Results*, 112.

⁶²*Supra*, footnote 26.

his writ of *habeas corpus*, the return to which by Lloyd, commandant of the military internment camp, stated that Wallach was detained under a warrant from the Minister of Defence reciting (in accordance with the regulation) that upon information furnished to him he had reason to believe and did believe that Wallach was disaffected or disloyal. The Supreme Court of Victoria considered this return insufficient, but the High Court on appeal reversed this decision.

In the Supreme Court of Victoria, Cussen, *J.*, dissenting, says:

"I have come to the conclusion that it was intended by these Acts" (*i. e.*, the War Precaution Acts 1914-1915) "to make a full delegation to the Governor-General in Council of the powers of the Commonwealth with reference to the public safety and defence of the Commonwealth. This view is in the first place strongly indicated by the title of the Principal Act, which is 'An Act to enable the Governor-General to make Regulations and Orders for the Safety of the Commonwealth during the present state of War'.

* * * * *

We are dealing with an Act referring to a state of war, and not a state of peace, and in such an Act one might expect that extraordinary powers would be conferred on representatives of the Executive Government."⁶³

The High Court (Griffith, *C. J.*, Isaacs, Higgins, Gavan Duffy, Powers and Rich, *JJ.*) unanimously upheld the validity of the regulation. Higgins, *J.*, says:

"In all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority, in the supreme ordeal and grave peril of national war. The aphorism *Inter arma silent leges* is that of a Roman violator of the laws; but the laws of Rome on many occasions deliberately and organically committed extreme powers to dictators, in grave emergencies; and when the office of dictator had fallen into disuse, the Senate used to endow the consuls with similar powers under the *decretum extremum atque ultimum*."⁶⁴

⁶³*Rex v. Lloyd, Ex parte Wallach* [1915] Victorian L. R. 476, at pp. 485-486, 488.

⁶⁴20 Commw. L. R., at pp. 309, 310.

The right of the Commonwealth Parliament to delegate powers to the executive is thus now firmly rooted in constitutional practice. The discretionary, even arbitrary power placed in the hands of the Minister is also vindicated in Wallach's case, for:—

“Having regard to the nature and object of the power conferred upon the Minister and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it. If this be so, the only inquiry which could possibly be made by the Court on the return to the writ with respect to the statements in the warrant would be whether the Minister had in fact a belief arrived at in the manner I have indicated.”⁶⁵

It only remains to look very briefly at the question of interstate free trade—a question which is not directly related to the defence power, and which consequently is somewhat apart from the main thesis of this article, but which arose out of action taken by the States of New South Wales and Queensland as a consequence of war conditions. Section 92 of the Australian Constitution reads:

“On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”

This section, couched in apparently plain and unequivocal language, had already provided (and possibly will yet provide) matter for litigation in the High Court. Since the outbreak of war, and largely on account of war legislation in the States of New South Wales and Queensland, there have been two most important decisions on the question.⁶⁶

In *New South Wales v. Commonwealth*,⁶⁷ it was contended that the provisions of section 92 were violated by the Wheat Acquisition Act 1914, passed by the Parliament of New South Wales. Section 3 of this act provides that the Governor may by notification in the *Gazette* declare that any wheat therein described or referred to is acquired by His Majesty, and that upon such publication the wheat shall become the absolute property of His Majesty, *i. e.*, of

⁶⁵20 Commw. L. R., at p. 304, *per* Griffith, C. J.

⁶⁶For previous considerations of section 92 see *Fox v. Robbins* (1909) 8 Commw. L. R. 115 and *Rex v. Smithers* (1912) 16 Commw. L. R. 99.

⁶⁷(1915) 20 Commw. L. R. 54.

the Government of New South Wales which like other governments within the empire is personified by the Crown. Section 8 annuls contracts made in New South Wales prior to the act relating to the sale of New South Wales wheat to be delivered in the said state. The effect of these provisions, it was contended, was to hamper the freedom of interstate trade.⁶⁸

The High Court held that the terms of section 92 were not violated, as the ownership, and with it the power of disposition, had passed to the Crown; there had been a mere transfer of rights from the individual to the Crown without any diminution of those rights.

"The right to control such disposition is limited by sec. 92 of the Constitution. But that section has nothing to say to the question of title. The duration of the power of disposition, which depends upon title, is coextensive with the duration of the title itself, and ceases with it. There cannot therefore be any conflict between the law of title and the law of disposition, and a law which deprives a man of the ownership of property does not interfere with his power of disposition while owner. Sec. 92 may, therefore, so far as it relates to commerce, be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one state to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of goods the section ceases to have any operation so far as those goods are concerned.

When the wheat in New South Wales became the property of His Majesty, the Sovereign, as the new owner, had the exclusive right of disposing of it. If the Government desired to export it to another State they were free to do so. Whether they did or did not, their power of disposition was not interfered with."⁶⁹

The states are thus confirmed in their power of expropriation or eminent domain; the argument that the individual is consequentially hampered in his freedom of trade falls to the ground, for, as the Court points out, ownership has passed to the state, and the new dominion, the state dominion, enjoys the protection previ-

⁶⁸A great portion of the argument of this case centered on the problem whether the Interstate Commission was properly a "court" with judicial powers; this is omitted from the present consideration.

⁶⁹20 Commw. L. R., at p. 68, *per* Griffith, C. J.

ously accorded to the dominion of the private owner. In this, the High Court Justices substantially concurred, and this, as *Duncan v. State of Queensland*⁷⁰ emphasizes, is the true *ratio decidendi*.

Duncan's case takes us a step further, and discovers what the Melbourne *Argus* of October 26, 1916, describes as "remarkable limitations" on the Constitution. The Meat Supply for Imperial Uses Act 1914, passed by the Queensland Parliament, provides (*inter alia*):

Sec. 6 (1) "It is hereby declared that all stock and meat in any place in Queensland are and have become and shall remain subject to this Act, and shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war."

Sec. 7 (1) "All persons whosoever, including the owners, consignors, consignees, shippers, vendors, and purchasers of stock and meat, and each of their agents * * * are hereby prohibited from selling, offering for sale, disposing of, forwarding, consigning, shipping, exporting, delivering, or in any manner whatsoever dealing with any stock or meat (whether the same is or is not actually appropriated to His Majesty by an order made under this Act), except only in pursuance of and under the directions and orders of the Chief Secretary."

One Laura Duncan applied for a permit to cross certain fat cattle over the border of the state; this was refused, and plaintiff brought an action contending that the act, being a total prohibition of export save in certain circumstances, was an infringement of section 92 of the Constitution.

Now a similar case on a similar act had come before the High Court not long before, and in *Foggitt, Jones & Co., Ltd. v. New South Wales*,⁷¹ the Court (Griffith, C. J., Barton, Isaacs and Rich, JJ., Gavan Duffy, J., doubting) had decided that in so far as the New South Wales Meat Supply for Imperial Uses Act 1915 purported to authorize the Government of New South Wales to prevent the export of stock by the owners thereof from that state to another state, it was an interference with the interstate trade and commerce and was therefore invalid as being an infringement of section 92 of the Constitution. In Duncan's case there is a

⁷⁰(1916) 22 Commw. L. R. 556.

⁷¹(1916) 21 Commw. L. R. 357.

complete reversal of opinion, and the act complained of is held good. Barton and Isaacs, *JJ.*, dissented very strongly, the majority being constituted by Griffith, *C. J.*, Higgins, Gavan Duffy, Powers and Rich, *JJ.*

The difference in point of view seems to be this. The majority justices look at the complete power of the states to control the acquisition or disposal of property as recognized in the Wheat Acquisition case,⁷² and consider this acquisition of meat by the Queensland Government to be in principle the same. The minority, on the other hand, say that this is clearly distinguishable from the Wheat Acquisition case, because here there is no transference of ownership from the individual to the state:

"It is well to point out at this stage that the defendants did not before action acquire the cattle as owners.

* * * * *

it is made plain that until the making of an order * * * by the Chief Secretary or his Under-Secretary stock were not to cease to be the property of their then owners."⁷³

This distinction once established, Barton and Isaacs, *JJ.*, regard this act as a prohibition of export that is absolutely at variance with the provisions of section 92; they support the decision in Foggitt, Jones' case. It is certainly difficult to disagree with Isaacs, *J.*, when he says that—

"If the State can then forbid the export from Queensland of the commodity absolutely, it can do so conditionally, and that condition may be the payment of a sum of money—which in pre-federation days was called a tax."⁷⁴

The whole decision is one of possibly far-reaching effects, and clearly represents the most advanced step yet taken by the Australian High Court away from the popularly accepted meaning of freedom of interstate trade.

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⁷²*Supra*, footnote 67.

⁷³22 Commw. L. R., at pp. 583, 585, *per* Barton, *J.*

⁷⁴22 Commw. L. R., at p. 617.

AN UNSOLICITED REPORT ON LEGAL EDUCATION.

There are seven principal subjects of legal education which present difficulties, or at least demand some comment.

1. The methods of teaching law; 2. The "law" which is taught; 3. The subjects of the curriculum; 4. The size of classes; 5. The requirements for admission; 6. The relation of the teacher to the curriculum; and 7. The relation of the teacher to practice.

I.

THE METHODS OF TEACHING LAW.

There are two methods of teaching law—the case-book method and the text-book method.

The Case-Book Method.

From the point of view of the student this consists in using a case-book in which selected cases are arranged in chapters and sections very much like a text-book. The important problems and frequently the historical development of subjects are presented by selected cases. The student reads each case, usually abstracting it in a note-book. He comes to class and takes notes of the analysis of the case and the discussion of the problem raised. Upon the conclusion of each chapter or section he prepares a summary from the cases and his notes. That summary is his text-book.

Students, however, come to the class-room with very different degrees of preparation. Some not only have analyzed and abstracted the cases, but have observed the problem raised and developed a mature view as to its solution and are, therefore, prepared to discuss in class the problem and the soundness of the solution which they have worked out. Others, and by far the larger portion, read the cases and abstract them faithfully, but they wait for the revelations of the class-room to secure a statement of the problem and its solution. They are, therefore, not satisfactorily prepared to carry on the discussion of the class-room about the problems which the cases raise.

From the point of view of the instructor, the case-book method of teaching presents at least one feature which should be empha-

sized. It may be assumed that the instructor has analyzed the cases, knows the points of each one, its relation to other cases and what may be said by way of approval or criticism of the result of each. It may be assumed also that he is prepared to deal with further collateral matters which should be dealt with in connection with the subject matter of the cases. In short it may be assumed that, so far as knowledge goes, the teacher is well equipped. Still the case method demands something more of the teacher. It requires a technique or art of teaching by the use of cases. This is something quite apart from legal knowledge and legal scholarship. This art or technique in general involves a discussion of the cases with different members of the class. It usually begins by one member of the class being asked to state the case. Then frequently follows a series of questions designed to improve the analysis of the case itself with a view to extracting the precise point involved or to distinguish it from some other case. In many instances the point of the case having been brought out clearly nothing more remains but to pass on to the next. If, however, the case-book is of the right sort a large proportion of the cases will raise problems. One case will stand for one proposition and another for a position inconsistent with it, so that some choice between them must be made. Here is the place for the instructor to use what may be called the art or technique of the case method of teaching. The teacher must now assume a role very like that of the cross-examiner of an expert witness. Let him imagine himself examining an expert witness as to the law of a given jurisdiction. He secures from the student a decided opinion upon the problem. Whatever it is, the instructor should be prepared to break him down. This, of course, is most frequently accomplished (if it can be accomplished at all) by putting the cases where the logical result of the position taken is incongruous or absurd, or where it seems to be because the witness does not see the way out. If the instructor can break the student expert down and force a reversal of his opinion and then start in on him again and break him down a second time, so that he is forced to admit that his first opinion was right, the instructor will score a considerable success. If the instructor can then go further and challenge any member of the class to produce a logical, workable hypothesis and if nobody can do so, and then if the instructor can himself produce a solution of the problem and in turn stand cross-examination, the session has been a decided success. The case method of teaching requires for its

success that some such processes be gone through with at least once out of every two or three lectures. The instructor must prepare definitely for this sort of cross-examining process. After all the requirements of knowledge on his part are fulfilled, he should put in a considerable amount of time and ingenuity in making that preparation.

The Text-Book Method.

When text-books are used, the class begins with a generalized statement as to the law and then may possibly work backwards into the cases cited to determine whether the generalized statement is justified by them. If this process is carried out, the student will have read the cases and formulated some generalization from them. It may even be that the instructor will go through the same cross-examining process as when the case-book is used. Many lawyers, no doubt, who learned their law from text-books, readily recall that they were taught in this way.

The explanation of the great triumph of the case-book over the text-book method of teaching law is not difficult, in the retrospect, to understand. The text-book lent itself to lazy methods on the part of the student and teacher. It was likely, by its mere form, to degenerate into the student's learning generalizations by rote and the instructor merely quizzing the student perfunctorily about them. Then the analysis and generalizations of the text-book, crystalized as they were in type, tended to become less vital. Such were probably the tendencies actually at work in the text-book method of teaching when the Harvard Law School Faculty began teaching from cases and producing case-books. The new form of the case-book and the new requirement of reading the cases first and then constructing a text after analyzing and comparing cases at once eliminated the lazy tendency promoted by the use of a text-book. Students and teachers had to do some thinking and make some fresh formulation of principles. The fresh analysis of legal problems and the fresh generalizations which the first makers of the case-books achieved in the course of their teaching and writing were far superior to those of the text-book writers of the day. It would have been surprising indeed if the text-book teaching of the seventies had survived the vitalizing features of the case-book teaching as it was first practiced at Harvard.

There is, however, no reason why the case-book method of teaching should not become quite as decadent as the text-book

teaching of the seventies. When the same case-books have been used for a good many years—when text-books have been written upon them and the notes of lectures circulated so that there is a settled text accompanying each case-book—when for a generation or more no new life has been infused into that text, students and teachers may become as lazy with case-books as they did with the text-books. The class-room exercises with the case-books may degenerate into the mere quizzing about the text which has been settled and which goes with the cases. The text itself may become old and lifeless. When such a time arrives there is little difference between the case-book method and the text-book method which the former superseded.

II.

THE LAW TAUGHT.

What "law" shall the law school teach?

This need not be complicated with any philosophical discussion of what is "law", or what is "common law".

The question is entirely the practical one of what body of principles and rules should the student familiarize himself with in order to become an effective practitioner. These may be different in different jurisdictions and at different times in the same jurisdiction. However valuable it might be, the student who is to practice on the continent of Europe, would hardly devote the major portion of his time to the common law as taught at an American law school. Nor would the student who is to practice in an American jurisdiction spend the major portion of his time upon the Roman and continental law.

The practitioner as a solicitor or barrister in England has certainly always endeavored to master the principles and rules which were in effect in the English courts for the time being. The English writers upon the common law have devoted themselves to the parochial consideration of the principles and rules enforced by the English courts. They undoubtedly look upon law, so far as legal education is concerned, as the body of principles and rules announced and enforced by their courts of authority. These have been the principal sources of study for the practitioner in England.

In the United States the situation has been peculiar. During the greater part of the 19th century, the process which followed the settlement of a vast territory was the transplanting of the com-

mon law to newly settled lands. In the earlier part of the century we had the works of Kent, Story and others who re-wrote the English text-books on law as an aid to transplanting the common law. We had also the reaffirmances of the common law and modifications of it, which had occurred in the eastern states, to transplant to the western with further modifications. When Langdell began his work as a legal educator in 1869, the teaching of the common law as developed by the English courts was still the most valuable training for actual practice in an American jurisdiction. Langdell's work indicates that the law which he taught was the law as made or declared by the English courts. But the last two decades of the 19th century saw such an avalanche of decision making in courts of last resort in the many states of the Union,—to say nothing of other English speaking common-law jurisdictions—that Langdell's plan of teaching common law as laid down by English courts of authority was modified. Langdell's followers and associates began at once the construction of case-books based upon English and American cases, which presented many conflicting results. They were still most serviceable, however, in preparing students for actual practice, because in a large part of the United States the law was still in a process of making by transplanting or copying the results reached in other American jurisdictions. Text writers followed the same plan. The law publishers produced encyclopedias of law which followed the same plan. Digests of enormous proportions were issued. The West Publishing Company Reports are based to a considerable extent upon the theory that to know the law of any jurisdiction one must know the decisions of all the jurisdictions at once. Today in the United States we have a great vested interest in a general common law of the forty-seven different state jurisdictions of the country; as if, though separate and each with its own court of last resort for a large body of law, there was one law for the whole. The law schools have a vested interest in this idea because they wish to secure students upon a country-wide basis. Even professors have a vested interest in it, because their case-books are constructed upon that theory and the sales are dependent upon it. Text-book writers have a similar vested interest in the general common law. The law publishers probably have the most extensive vested interest in it, since they issue volumes which are to sell throughout the country.

Here is the vital weakness in legal education in this country today. It is no longer true that there is any practicable teachable

general common law of the United States on most subjects. The mass of decisions has swamped the law teachers, the judges and the practitioners and also the text-book writers. The time has arrived when text-book writers cannot undertake the collecting of all decisions from all jurisdictions upon the subject that they are writing about. The text-book writer cannot talk about law in any such general terms. If he attempts to cover the law of the entire country, he simply tries to write the law of each of the forty-seven different states in his text and foot notes, classifying the different variations as best he can.¹ The practical result is that judges and lawyers are of necessity being forced back to the parochial attitude of the English lawyers and judges. They are confining their attention and views to the local situation as it appears in the decisions of the local court of last resort and the local statute book. This means that legal education to be practically effective must follow the same lines. The case-book and the text-book must be developed with an eye to what the law of a single jurisdiction may be. This does not at all mean that it shall contain only local cases. It does mean, however, that the outside cases must be chosen with reference to their effectiveness in expounding the law of the particular jurisdiction. The instructor must be a master of the local

¹Mr. Wigmore in the preface to his great work in Evidence said (at page ix):

"The fact that there are half a hundred practically independent jurisdictions must be conceded and faced. What is the law? is a question which cannot be answered except as with fifty tongues speaking at once. What the law is in Illinois may well be not the law in Massachusetts or in California. It is time for the profession to discard the amiable pretence that precedents can be cited interchangeably. The treatise, on the one hand, is not to represent that the rule is unsettled because there are inconsistent rulings; for opposition is not inconsistency, and independence of jurisdiction leads naturally to opposition of rules. *The practitioner, on the other hand, can often expect not much more of the treatise than to furnish the materials for ascertaining what is the rule in a particular jurisdiction.* If this independence of jurisdiction be steadily recollected, three-quarters of the reproach of uncertainty disappears." (The italics are the present author's).

It was in order to furnish the practitioner with the materials for ascertaining what was the rule in each particular jurisdiction that Mr. Wigmore has, as he himself tells us in the same preface (at page ix), arranged "the rulings in the alphabetical order of jurisdictions, in chronological sequence within each jurisdiction, and by separating each group (where numerous rulings occur on the same point) by the italicized title of the State or Territory."

law so that he may indicate what cases of other states may profitably be studied as indicating the law of the local jurisdiction.²

The vested interests in the general common law, of course, bewail and deplore any such course of development. They say it will defeat uniformity and that the fiction of a general common law aids in keeping a desirable uniformity. But no one gets what he wants by merely wanting it. If the devotees of the general common law want it, they must have the United States Constitution amended so that there may be a uniform system of courts for the United States and a court of last resort for the whole United States. That is the only step which will produce a really uniform general common law and enable the law teachers and text writers to say what the common law is when speaking of the law of the entire United States. Of course, there is no prospect of any step of this sort in the near future. It may be that some foreign war disastrous to the United States may end our independent state governments and consolidate them all into one centralized governmental machine. When that time comes there may be a uniform system of courts in the United States and the decisions of a single court of last resort may establish a general common law for the entire country. Until that time arrives it behooves some law schools at least to face the situation as it is and shift to the basis of making the local common law in a particular jurisdiction the principal subject of instruction.

If the case-books which illustrate the problems of the local law of the particular jurisdiction are properly constructed with those leading English and American cases which are a true indication of that local law, much may be done to give the student a training quite as serviceable to him if he practice in other jurisdictions, as the present case-books are supposed to be.

Nor will there be any less training in legal reasoning from the use of properly constructed case-books designed to indicate the local law of a particular jurisdiction than is to be obtained from the present style of case-books.

Will the intensive study and analysis of the local law leave any place for a few great schools devoted to the wider generalizations of juristic thought and the development of analytic, historic, comparative, legislative, synthetic and operative processes unrelated to the law of any particular jurisdiction—a sort of inter-nationalistic law school? Perhaps so. But certainly not unless the law school

²The Next Step in the Evolution of the Case-Book, 21 *Harvard Law Rev.* 92; A Further Word in the Next Step in the Evolution of the Case Book, 4 *Illinois Law Rev.* 11.

which devotes itself to supergeneralizations be founded upon the intensive work of the faculties of many local law schools throughout the country and the recruiting of its faculty from such extraordinary products of the local law schools as Mr. Pound and Mr. Wigmore would have been.

III.

SUBJECTS OF THE CURRICULUM.

Mr. Wigmore's recent plea for additions to the curriculum³ does not, it is believed, give promise of any abundant new vitality for law teaching.

Mr. Wigmore regards the principal subjects of the present curriculum as developing mainly the "analytic process". He concedes that these courses properly handled may do something toward developing the "historic process", the "synthetic process", the "comparative process" and "operative process". It is believed that the same courses could be so handled as to do something for the development of the "legislative process" as well. But Mr. Wigmore does not advocate the use of the present conventional courses to accomplish these purposes. He would isolate the different processes and enlarge the curriculum by adding separate courses designed to develop mainly the "historic process", other courses which would develop mainly the "legislative process", and so on. No doubt his suggestions when carried out would add much that is intrinsically desirable in legal education, but the question is always one of choice and emphasis. What we really want to know is, not whether something is good in itself, but what is it that our first efforts must be concentrated upon if we are to succeed at all. What is the *sine qua non* of any success or vitality in legal education? We cannot afford ever to lose sight of that. The difficulty with Mr. Wigmore's proposals is that they tend to obscure our view of what is most important by putting other matters and plans for action between it and us. We are asked to advance when our old communications have been cut and no new base has been acquired.

The teaching of law still rests for its greatest success and vitality on the character of the teaching of those courses which Mr. Wigmore declares are of service mainly in developing the "analytic process". The Harvard Law School under Langdell

³30 Harvard Law Rev. 812, 826.

and his associates incidentally put new life into the historic, the synthetic, the comparative and possibly the operative processes of legal thought, but the real basis of their successful drive in legal education was the new life and vitality which they put into the analysis of legal subjects and problems. By that means (quite as much as by any new method of teaching considered by itself) the Harvard Law School secured a leadership and a student body which has been unexcelled for many years. Whenever law teaching becomes decadent, the reviewer would do well to look at the character of the teaching of the "analytic process" courses. When that process declines, law teaching will decline. Not all the other processes combined, pushed to the utmost, will save it. When the "analytic process" in legal education revives, legal education itself will prosper.

It is with this in mind that stress has been laid in this article on "The Law Taught" as a more vital matter than the "Subjects of the Curriculum". It is the writer's belief that the renaissance of the "analytic process" and the consequent rehabilitation of legal education require the re-analysis and re-statement of the subjects of our "analytic process" law courses with reference to the decisions and statutes of single jurisdictions having a court of last resort and a legislature of sovereign authority. When that has been done it will be time to discuss the question whether the historic, legislative, synthetic, comparative and operative processes shall be developed through the medium of the same material as that which is used to develop mainly the "analytic process", or whether special courses shall be given designed to develop mainly those processes respectively and separately. To yield to Mr. Wigmore's demand for new courses at this time would leave the principal cause of decadence in law teaching untouched. It would direct the activities of law teachers away from the weak point in law teaching. It would lay out a plan of constructive effort which would require a great deal of time from an already short-handed profession. In the meantime the "analytic process" and the courses which promote it will decline still farther, and with this decline will go the influence and position of the law schools. Mr. Wigmore's leadership represents the possible course of advance for a system of legal education which is fundamentally sound and safe. It will only hasten the end of a system as ill-grounded as the present one is at the present time.

So long as the law school ideal of teaching the general common law be accepted and Mr. Wigmore's proposals for the enlargement

of the curriculum be rejected, there is not much to be said about the curriculum now in vogue. A few subjects like international law, jurisprudence and Roman law may be added and placed in an optional fourth year of study. Small disputes may be carried on as to whether one subject shall be taught in one course or in another, or whether several courses shall be divested of certain matters which can better be brought together in one course. For instance, much talk may occur as to whether the specific performance of restrictive covenants as to the use of land be treated in the first year property course under the head of equitable easement or in the course on equity jurisdiction under the head of specific performance of restrictive covenants. Shall torts and criminal law contribute certain common elements to make up a course called legal liability? Shall contracts, torts, corporations and public utilities be relieved of certain subjects in order to make up a course on contracts and combinations in restraint of trade? Shall persons or damages give way to a course on contracts and combinations in restraint of trade, assuming that all cannot be given? How far is it feasible or profitable to go in courses on practice? Should there be a general introduction as to what law is and the relation of subjects of law to each other? Should the student be introduced to legal studies by lectures upon the judicial department of government and the principles of judicial administration? Or should there be no introduction at all? These are all comparatively trivial matters. Our attention may be often directed to the inevitable tendency in teaching general common law to ignore important branches of law which have developed under the statutes. Case-books are constant reminders of the omissions of such subjects, unless the statute be one of Edward I or Henry VIII or Charles II. The omissions in this respect may not be a trivial matter, but certainly nothing can be done about it so long as the ideal persists of teaching the law of half a hundred different states as if each administered the same body of general law.

IV.

SIZE OF CLASSES.

Where the case method is used, the size of the class is thought to present a problem. According to the opinion of some, a class of more than seventy-five or one hundred is too large for the case method and the classes should preferably be half that number.

This view may well follow from the teacher's desire to reach every man and stimulate every man in the class. But such an attitude on the part of a teacher is likely to destroy the effectiveness of the case method itself. The instructor is likely to become a mere quiz master, laboring with the less able students on the theory that he is stimulating them. The fact is that the practice of the class-room discussion, or the technique of case-book teaching is not possible with the men of the class who merely read the cases, abstract them, come to class prepared to state them, and whose attitude of mind is then to wait for the lecture and discussion to inform them of the problem and its solution. Such men may be first class students and may secure the highest marks in examinations, but an instructor cannot conduct the case-book method of teaching very well with them. They come to the class prepared to write down what is said. They are not there prepared to discuss and argue. They are, as a result of their own partial preparation, the gallery, the audience, before whom the discussion with others is staged. That discussion is carried on with the men who have not only read and abstracted the cases but have seen the problem raised and have formed an opinion about its solution or worked out a basis of distinction between the cases which they are prepared to defend. In any class such men are comparatively few—twenty per cent. would be a high average. In a class of forty it would give the instructor eight men. In a class of 250 it will give him fifty. Of the two the class of 250 is far preferable. The discussion with the fifty prepared men of the large class will be better as a general rule than the discussion with the eight prepared men of the small class. This follows from the mere difference in numbers alone. Then the presence of a large gallery is more stimulating than that of a small one. The small class generally tends to let the instructor down. The large class keeps him up to his highest pitch of effort at all times. The small class and the large class will have their advocates, but the difference between them will, it is submitted, depend more on the instructor's temperament and aim in teaching, than on any dogmatic rule that can be laid down for guidance.

Up to this point we have proceeded upon the hypothesis that the large class maintained a high percentage of students who were prepared for the case-book method of discussion. Suppose, however, that in a class of 150 or 200 the standard of effort is such that only six to ten men are produced who are, as a result of their

own initiative, prepared for the best sort of class-room discussion. This is a number too small to warrant real class-room discussion with a few for the benefit of 140 or 190 others. The gallery is too large in proportion to the actors. In that case it would be better no doubt to cut the class in half and conduct it with a little dash of drill-sergeant energy with a view to bringing individual members up to a respectable standard of class-room discussion.

V.

REQUIREMENTS FOR ADMISSION TO LAW SCHOOLS.

The Harvard Law School was forced by the numbers demanding entrance to discriminate between those it would take and those it would not. Any one of several tests might have been adopted. The securing of a college degree was found to be a satisfactory requirement, insuring a certain maturity and preliminary education on the part of the student. It should not be overlooked, however, that it was *not* the requirement of a college degree that made the Harvard Law School student. It was the fact that the Harvard Law School had something vital and unusual to offer in the way of legal education that brought to it the men who have made its extraordinary student body. The requirement of a college degree was merely the outcome of a demand by so many for entrance to the school that some had to be cut off and denied admission.

This simple order of events seems to be overlooked. Schools have tumbled over themselves to place the requirement of a college degree upon admission on the supposition, apparently, that this would improve the personnel and standing of the student body.

Is such a hope justified?

When a law school has something unique to offer,—when it has a monopoly through the assembling of talent and efficiency in teaching and scholarship,—so that there is a greater demand for entrance to the school than can be accommodated, the raising of entrance requirements by requiring a college degree may in fact improve the personnel of the students and aid in preserving the predominant influence of the school. But how is a school to put itself in the position of offering something unique—something in which it for the time being has a monopoly? It cannot do so today merely by the use of the case method or copying the teaching of the Harvard Law School. It cannot do so by adding courses on jurisprudence and Roman law, or courses designed mainly to de-

velop the historic, legislative, synthetic, comparative and operative processes respectively and separately. In the opinion of the writer it is to be secured by a school which devotes such talent as the Harvard Law School Faculty possessed thirty years ago to an intensive study of the local law of a particular jurisdiction of importance, and the winning by at least a majority of the members of the faculty of a position at the bar as advocates retained by other lawyers in the handling of legal problems with which their teaching makes them familiar.

Suppose then a school has nothing unique to offer—suppose it has no monopoly of talent or of efficiency and no unique or unusual idea to work with, and no extraordinary student body to start with. Suppose it is just a mediocre school with a following of mediocre students using the Harvard Law School case-book and case-book methods of teaching. What will probably be the effect of a drastic raising of entrance requirements? Will it improve the student body, or will it in substance destroy the school? It is believed that in general it will do the latter, at least to such an extent as to play at once into the hands of the low standard night school. This is hardly a satisfactory result. The teaching of a small group of college graduates can hardly be offset against the loss of sending large numbers of men, among whom are future judges and successful practitioners, to an inferior school. The result may be pleasant for the instructor at the endowed school which can stand the expense of maintaining a faculty to teach a few college graduates, but the result on the whole is not desirable.

The only way for such a school to proceed is to develop its influence over numbers. It should spread its influence through teaching numbers rather than seek to improve the quality of the very few. The numbers which such a school is to influence must be gained by presenting *facilities*. It may develop a day school for college graduates and the night school in order to secure other men and to compete successfully for those it would otherwise lose. In other words, it may run a two-standard school. If there are several endowed schools in a given locality, each of which is trying to run a graduate school in the daytime, they should combine for the purpose of running a really good night school in order to reduce the influence of the inferior night school and to increase their own.

VI.

THE RELATION OF THE TEACHER TO THE CURRICULUM.

The relation of the law teacher to the curriculum is unsatisfactory because of too much rotation among different subjects and because of too little. Some law teachers, especially those who have changed frequently from one school to another, properly complain that they have been called upon so frequently to change the courses which they teach that they have never had a chance to master any of them in a satisfactory way. Others who have stayed many years in the same school have reason to complain that they have been stuck too many years with the same courses till the subjects have become worn out and stale and the teaching consequently distasteful. A systematic effort to avoid both difficulties may be undertaken by making four groups of courses and then assigning two or three instructors to each group and requiring some rotation by each instructor in a given group among all the courses of the group.

It is clear that criminal law, torts, evidence and common-law pleading and practice will fall in one group. This would be the group of subjects that has most to do with jury trials. Damages might rather arbitrarily be assigned to this group. A second group would clearly include the commercial law courses, such as contracts, sales, suretyship, bills and notes, agency, personal property, conflict of laws, bankruptcy, partnership and corporations. These courses on the whole deal with the substantive law most in use in commercial transactions. A third group would take in the three courses on property, two courses on equity jurisdiction, mortgages, equity pleading and practice, and trusts. Persons might rather arbitrarily be assigned to this group. A fourth group would contain the subjects relating to government. It should include the judicial departments of the state and federal governments, state and federal constitutional law, municipal government, municipal corporations, public utilities, taxation, practice before commissions and taxing bodies, interstate commerce, federal jurisdiction, international law, and practice before international tribunals.

The first group should have two professors. If the school be large so that the courses might be divided into two sections, they will have their hands full. If the school be smaller, it would still be advisable to have two professors for the first group, even

though one of them might devote part of his time to the courses in some other group. The second group should certainly not have less than two professors and possibly three. The fourth group should be in charge of two professors.

The administrative advantages of such a plan would be considerable. With two or three men for each group, the number of courses that each would have to give in any year would not be too large, and yet the knowledge that the teacher must prepare to give a new course the next year or after two years would stimulate an interest outside of the courses given. In time, when two or three men had given all the courses in a given group, their reactions upon each other would be beneficial to themselves and to the students. Furthermore, if any one was absent through illness or any other cause, there would always be a man ready who could step into his place at a moment's notice. A school so organized would be less likely to be left short-handed. At the same time the dry rot which comes over a course when one man gives it year after year indefinitely might be avoided.

VII.

RELATION OF THE TEACHER TO PRACTICE.⁴

The relation of the law teacher to practice is perhaps of more importance today than any other problem of legal education, unless possibly it be the question of what law shall be taught.

With the advent of Langdell and his associates, the law teacher who was a practitioner steadily declined. Langdell's associates gave up practice, or else they went from the classroom to the teacher's chair with no experience in practice or a mere apprenticeship in practice for a few years. The results justified this course. There was then a great pioneer work to be done. The case-books were to be made, a new life was to be given to legal formulæ and principles and the analysis of legal subjects and problems. Competition, which is the final arbiter of the value of ideas, gave the wreath of victory to the law teachers generally who did not practice over those who did. This has been held to establish a rule—almost a corollary to the case method of teaching itself,—that the law teacher should not practice. To some extent it has been accepted that the law teacher never needed to have practiced. The recent brilliant graduate may be taken and made into

⁴Should the Law Teacher Practice Law?, 25 Harvard Law Rev. 253.

a law teacher after a brief apprenticeship in an office. But whether accepted consciously or not, the fact is that most of the law faculties in endowed schools which have adopted the case method, have for the last twenty years been organized more and more as if some one had articulated and enforced the fundamental rule that the law teacher should not practice, and that recent graduates may become first class law teachers without ever having practiced. The result is that the most conspicuous thing about the law teachers of today is that they do not compete with anyone. They do not compete with an old system of teaching as did Langdell and his associates. That contest has been won. They do not compete with each other in any lively sense because the positions of all are permanent and the salaries secure. The fact that they do not practice is only another way of saying that they do not compete with the members of the bar in the slightest degree.

One member of the Langdell group said little, if anything, about the law teacher giving up practice, but he plainly refused to accept such action as the expression of a permanent and final policy. This was John C. Gray. Mr. Justice Loring, for many years Mr. Gray's partner, in an address delivered at Mr. Gray's death has told us why Mr. Gray remained in practice. Speaking at a meeting of the Bar Association of Boston and the Supreme Judicial Court of Massachusetts to honor Mr. Gray's memory, the Justice said:

"When Mr. Gray in 1875 accepted a professorship in the Harvard Law School, he deliberately chose that as his career for life. He continued in active practice, to be sure; but he continued in practice because he thought that if he was in touch with the realities of litigation and of affairs, he would be a better teacher of law. So much I have from Mr. Gray himself.
* * * He was the better teacher for being in active practice; he was the better lawyer from the learning which came from teaching law."

Mr. Gray was right. As a permanent policy, the divorce of the law teacher from practice is impossible. The extent to which it has already been carried bids fair to bring ruin to the law teaching profession and to the law schools, and to bring the great work of Langdell and his associates to an end—to say nothing of the incalculable injury it may do to the legal profession in the United States by depriving it of the training which the law schools can give. The courts, especially the courts of last resort, are the ultimate

expounders or makers of the law. The courts, especially the courts of last resort, are the laboratories where legal generalizations are brought to the final test. Law teachers who do not take part in the submission of their views to the courts, who do not work them out in an intensive manner before courts and against able counsel, miss a training and a contact with law in the making and development, which the teaching profession can not afford to do without. Indeed, what man or body of men can be kept up to a proper pitch of effort or development without competition with someone? You might as well try to develop a football team without having any games, as to run a law faculty with all competition between its members and the members of the bar eliminated.

The law teacher needs to compete with the bar to prove that at least in his narrow field of effort he is equipped to speak with authority to lawyers at some bar and the judges of some court. He needs this for the improvement of his place among lawyers and judges, and to dispose of the general contempt in which law teachers are held by lawyers and judges. First class men cannot be recruited to a professional group which has not a first class standing in the profession to which it belongs. Law teachers need to compete with the practitioner in some degree for the sake of their own mental health. For a few years a law teacher can work enthusiastically and effectively, but the constant repetition of courses with the same cases and the same discussions will sooner or later put him on edge and undermine his mental health. If there be added the writing of extensive text books and the collecting and digesting of masses of cases, he can hardly avoid a nervous breakdown. Indeed the more active, energetic and ambitious the law school teacher is, the more likely he is to suffer. A reasonable amount of change from intensive academic work to the application of the law to a given case or debate before a court is of incalculable advantage to the law teacher, just as a change from the strenuous work of litigation to the relaxation of academic work is a relief from practice.

How is this combination of law teaching and practice to be achieved?

In the *first* place it must be made clear that the law teacher is not to be taken from among practitioners who continue to practice. On the contrary the law teacher whose profession is principally law teaching must achieve a practice and a position at the bar. Like Mr. Gray he must go into law teaching as his life work; he

must practice for the training which is necessary for the best performance of that life work.

Second: The law teacher must be restricted in his practice to advocacy. This may be done by the rules put upon his practice by the school, the enforcement of which should be placed in the hands of the Dean. He should be permitted to appear in causes only when retained by another lawyer. That cuts him off at once from the whole business of client care-taking. He may be consulted in non-litigated business or he may be retained to argue or conduct a particular case which is largely prepared by the lawyer employing him. But no law teacher should regard himself as having an advocate's practice when other lawyers seek merely to secure from him the services of a brief-writing hack. Under such restrictions the danger is not that the law teacher's practice will interfere with his teaching, but that he will not have any practice at all. Indeed it may safely be said that he will certainly have no practice unless he prepares himself by special efforts which the law teachers do not now make.

Third: The fundamental condition precedent to the law teacher acquiring an advocate's practice is that he become a master of the local law in the subjects which he teaches. If the plan of assigning teachers to related groups of subjects obtain, this means that the teacher will master the local law in all the subjects of his group, and will by that means have a sound basis for a specialist advocate practice.

If two or more men rotate among the courses of a given group, they will work together in mastering the local law of that group of subjects, and will be of great assistance to each other in practice.

The publication of their efforts will inform the local bar and the judges of their qualifications, and their comments on recent cases will make them the leaders in those branches of law which belong to the group of subjects which they teach, and should impress the lawyers and judges with the fact of their leadership.

For those who take up the subjects which form the basis of an equity practice or a commercial law practice, ten or twelve arguments a year will be a large number. The arguments will be largely on law points and they can step easily from the classroom to the court-room. For those who take up evidence, criminal law and torts, some experience in jury trial cases must be obtained. The conduct of jury trials must be undertaken. This can be done by

the instructor obtaining an appointment as assistant state's attorney or being employed in the trial department of a traction company during a period when he is given a leave of absence.

Opportunities to practice should constantly increase as a result of the attitude of the alumni of the school towards its instructors. The time may come when influential alumni at the bar may take quite as much interest in seeing that the law teacher has a chance to show what he can do in practice as they now expend in recommending young men to enter the school in question.

Fourth: It will now be observed that the group plan of courses and the assignment of two or more instructors to a group will make it far more possible for a teacher to engage in practice as an advocate than is now practicable under a system which provides one man to a course with nobody else willing or able to take his place when called upon.

Fifth: If any law teacher becomes too popular as a practitioner (which is entirely unlikely, at least for a long time after he has become a teacher) he may raise his fees. The cases which he takes may be, to some extent at least, under the control of the Dean. In this way he may be forced to restrict his practice to the point where the law school does not suffer, or he may resign. The spectacle, however, of the law teacher advocate who resigned because his advocate's practice was so large and lucrative, would give the law school in question an enviable prestige. If such a step by its teachers became common, places on its faculty would be prized as highly and sought for by ambitious men as eagerly as the places upon our most eminent courts.⁵

⁵The following form is recommended as expressing an arrangement between a law school and a teacher who is to practice:

INDENTURE made this day of, 1917, by and between (on behalf of the University of) party of the first part, and party of the second part, WITNESSETH that,

WHEREAS, the first party is desirous of obtaining the services of the second party as a teacher of law in the University of Law School, and particularly as a teacher of the law of Future Interests, and

WHEREAS, said first party fully realizes that the services of the said second party cannot be obtained by the offer of a mere reward of money to be paid the second party but only upon said reward coupled with the opportunity of the said second party to obtain a position of authority, dignity and importance in the community of lawyers and teachers which the said law school more immediately serves, and

WHEREAS, the said first party now fully realizes that unless a considerable proportion of the members of every faculty of law teachers are permitted, encouraged and even, in some instances, required to secure and maintain a position of authority, dignity and importance among lawyers and judges in the community which the law school more immedi-

Sixth: Under such a plan a law school faculty would become a new sort of firm of lawyers—a group of legal specialists equipped to hold their own in practice and bringing into practice their academic deductions and opinions. The bench and bar and law schools sadly need the fresh breeze that such a group would create.

Seventh: But where can any such law faculty be recruited? With a few possible exceptions, certainly not among the men now teaching law. A new sort of law teacher must be created, just as Langdell had to create teachers of a new stamp to introduce the case-books. It is suggested that out of the twenty best students of each of the last five graduating classes of the Harvard Law School, there might (barring the war) be found five able enough, ambitious enough, and strong enough, who were willing to leave their training camps for client care-taking to enter one where a mastery of the law in a related group of subjects was to be used as

ately serves, by reason of the fact that such law teachers successfully compete with both the lawyers and judges in the branches of law which, as teachers, they respectively make particularly their own, the law teachers must deteriorate and their position in the community becomes such that self-respecting and ambitious men will not enter the law-teaching profession, and that it will be filled, for the most part, with a characteristically non-competing class who must take such position in the community and among lawyers as those who do compete are unwilling to strive for;

Now THEREFORE, the party of the first part in consideration of the premises does promise and covenant that the party of the second part shall not only be permitted and encouraged, but shall be *required* to practice law subject to the restrictions and limitations hereinafter provided and to succeed therein upon the pain and penalty of having his salary reduced or having all advances in salary denied if he does not succeed.

The restrictions and limitations upon the practice of said party of the second part hereinabove referred to shall be as follows:

(1) The party of the second part shall not engage in practice except as he may be retained by other lawyers for consultation in non-litigated matters, or to conduct or aid in the conduct of litigation.

(2) That the second party, without the consent of the first party first obtained, shall not accept as compensation for his services less than Fifty Dollars (\$50) per day.

(3) That the second party shall not, without the consent of the first party first obtained, engage himself in the conduct of any litigation which involves on his part his presence at continuous day to day hearings before a court for more than three (3) days at a time.

(4) That if, in spite of the fact that the above restrictions are faithfully adhered to, the party of the first part shall find that the teaching work of the said second party suffers by reason of his being so engaged in the practice of the law, said first party may call upon the second party to raise his fees to a sum not exceeding Two Hundred Dollars (\$200) per day or to resign from the faculty.

The party of the first part also covenants and agrees that, subject to the above restrictions and limitations, he will aid and use his influence and the position and influence of the school, so far as he may command it,

the foundation not only of successful teaching but also of an advocate's practice in the courts and a position of authority and weight with lawyers and teachers. It is a well known fact that many of the ablest law school graduates who make little headway in the rookeries of the client care-takers, and begin after five years to find it out, are admirably fitted to distinguish themselves in the career which is here outlined.

CONCLUSION.

The law schools, if they do not already, will soon need some new idea to vitalize and revive their teaching and influence. It is the writer's belief that this will not come from the supergeneralizations of jurisprudence or the study of foreign systems of law, or from

with the graduates thereof practicing at the bar in and elsewhere and with other lawyers, to secure for said second party an opportunity to be retained in litigated cases dealing with the subjects which he handles in the school as a teacher, to the end only, however, that the said second party may have a fair opportunity to demonstrate to the members of the bar that his services are worth securing at the minimum price above mentioned.

The first party also covenants and agrees that in case of the success,—even a very moderate success,—on the part of the second party in practice under the above limitations and restrictions, the said second party shall be entitled to all the considerations, emoluments and dignities now accorded to members of the faculty who give all their time to teaching and do not practice in any degree.

The second party on his side agrees to devote himself primarily to the teaching of such courses at the University of Law School as shall be mutually agreed upon, including the course on Future Interests, otherwise known as Property III, and to observe all the restrictions and limitations upon his practice above set forth.

The second party further covenants and agrees that, next after the faithful preparation of said courses and teaching them, he shall equip himself for the practice of law primarily in the State of, subject to the restrictions and limitations above set forth, by collecting, analyzing and synthetically assembling in a first class text-book the decisions of New York, Michigan, Wisconsin, Minnesota and California upon the subjects of Future Interests and Perpetuities, more or less common to all of said States by reason of their having copied to a substantial extent the New York Statute of Perpetuities, and by collecting, classifying and arranging the decisions of the Supreme Court of relating to all the subjects which the second party teaches.

The second party further covenants and agrees that he will in all respects possible and consistent with his duties as a teacher seek to compete with the lawyers and judges of the state of and to demonstrate to them that in certain branches of the law and in the application of the principles relating thereto his opinions and views have a standing which cannot be ignored or overlooked by either the judges or practicing lawyers.

IN WITNESS WHEREOF we have hereunto set our hands and seals the day and year first above mentioned.

..... [SEAL]
 [SEAL]

an enlargement of the curriculum by courses which mainly develop the historic, legislative, synthetic, comparative, and operative processes respectively and separately. It will come from a parochial attention and intensive analysis of the law of some particular jurisdiction, together with the maintenance of a position at the local bar as an advocate by the majority of the teachers of a given faculty. Along with these radical departures from the present fundamental tents of law schools will necessarily go modifications in the case-books, in the curriculum and in the relation of the teacher to the curriculum.

Where is this new movement to come from? It is difficult to tell. The vested interest in the general common law is greatest in the largest and most successful of our law schools today. It is hardly conceivable that they should take a step which would tend to destroy what at the moment is perfection. The new experiment may be expected from one of the schools which has been less successful.

Furthermore, the geographical location of the school which is to make the experiment must probably be contiguous to, or in the midst of, a great center of population, and in a state which has a legal history and reports extensive enough really to enable a body of men to build a comprehensive system of law from them.

ALBERT M. KALES.

CHICAGO, ILL.

THE PROCEDURE IN THE *COUR* *D'ASSISES* OF PARIS.¹

The *Cour d'Assises* is the court in France for the trial of felonies before a jury. From the beginning of a case to its end, a trial in a French criminal court shows a series of contrasts with our own procedure.

Instead of having only one judge presiding, there are three. The reason for this is easily understood if we consider the history of the French people; but the explanation of an event is not an excuse for its existence. The theory, of course, is that three judges are better than one; that there are more safeguards thrown around the administration of the law when there is more than one judge. But as a practical matter, not only in the French courts, but also in the American courts, whenever there is more than one judge there is less responsibility placed upon the shoulders of each, and, instead of having more safeguards thrown around the administration of justice, there are fewer. As a matter of practice, the president of the tribunal in a French court does all the work. Though the other two judges are supposed to assist him, their functions, so far as the spectator can see, amount to nothing. They seldom speak to the presiding justice during the course of the trial; only when the time comes for deliberation concerning the punishment is their opinion asked.

Again, in our Anglo-American system, the case for the prosecution is presented by the district attorney. There is also a district attorney in the French courts, but he does not present the case for the prosecution. That task is in the hands of the president, and it is accomplished in one of three ways: by an examination and cross-examination of the defendant; by an exposition of the facts to the jury; or by a combination of the two. There has already been an investigation of the case by a *juge d'instruction*—an investigating judge who gathers all the facts of the case and of the defendant's life which can in any way conduce to the illumination of the defendant's character or the commission of the crime. The results of this investigation have been embodied in a report called the *dossier* and sent to the *Cour d'Assises* after

¹The substance of this paper was delivered before the Criminal Science Department of the Law School of the University of Paris last February.

indictment by the *chambre de mise en accusation*—which is equivalent to our grand jury. The president of the *Cour d'Assises*, since he has examined the prisoner personally and has studied the *dossier* before coming to court, occupies a unique position.

He is acquainted with all the facts of the case, and these, following a reading of the indictment by the clerk of the court, he usually narrates to the jury. After this narration, he examines and cross-examines the defendant in order to emphasize some of the facts already pointed out and in order to bring out others. This proceeding differs according to the individual and according to the case. Moreover, the exposition of the facts to the jury need not be in the form of narration but may take the form of direct and cross-examination.

One of the first things that strikes an American in this procedure is that the president is charged to present an impartial case. Although this is the theory, the practice cannot possibly chime in with it, for it is difficult for an individual to be impartial when he is presenting both sides of a case. Even with the greatest good will, he will fail. From my experience I have found that the attitude of the presiding justice is not that of one who is trying to bring out all the facts on both sides—although I have seen the desire on his part to bring out some of the facts which may tend to the exculpation of the accused—but of one who very naturally has been influenced by the *dossier* and by his impressions of the prisoner gained at the time of the prior examination in prison, and who has usually come to the conclusion that the defendant is guilty and should be made to explain. This gives the president a great deal of power, not only over the defendant, but also over the conduct of the trial and the decision of the jury. Under the law, the jury is supreme. But what does this theory amount to in practice? The president, under the law, is not allowed to charge the jury, the idea being, of course, that he must not be given an opportunity to affect the jury in his charge. But he is given every opportunity to do this very thing in the most impressive way during the course of the trial!² Again, the judge's cross-examination takes the place of that by the prosecution; but there is no parity, since the judge does not cross-examine the witnesses on behalf of the prosecution. In truth, the damage done by the judge is minimized only by the fact that the French jury is by tradition hostile to the court.

²*Code d'instruction criminelle*, Art. 313, 315.

Another of the striking differences is that the defendant is immediately put upon his defence. The case has already been investigated by an inferior judge and the defendant indicted by the chamber of indictment. All this preliminary procedure seems to point to at least a certain foundation for the action, and the reasoning is that the defendant having reached the *Cour d'Assises* must explain why he is in court. He need not explain until after the presentation of the case against him,³ but failure to speak will result in suspicion and probable conviction, since the French jury, unlike our own, may take such failure into consideration. While in a sense it may be logical to ask the defendant to explain the case that has already been made against him before the *juge d'instruction* and the chamber of indictment, in another sense it is highly illogical. This is a matter of trial reason. For, in theory and practice the jury ought to be, and indeed as a matter of theory under the French procedure is, the body that is to determine whether in this particular case and at this particular time the defendant has committed the act with which he is charged; and a jury cannot properly conceive the elements of the case and do justice if the accused is put upon his defence before the evidence against him is presented. The case before another judge ought to have nothing to do with the presentation of the case before the *Cour d'Assises*. And our Anglo-American procedure recognizes this. It recognizes that the case before the jury must be full and complete; that the jury being the judge of the facts must have every shred of evidence presented to it if it is to function properly. The gravity of the injustice worked by the French procedure is, it is true, minimized because, in many instances, the defendants admit their guilt and the trial proceeds upon the basis of the number and the quality of the attenuating circumstances which mitigate the enormity of the crime.

The attitude of the president towards the witnesses examined in the course of the trial is one of cordiality and credulity. A witness may say almost anything he pleases, whether on one side of the case or the other, and the president pays him the highest respect and does not for a moment doubt his truthfulness. All the studies in the psychology of testimony that have been made during the last forty or fifty years in Europe and America, and all the results of the practical working out of cross-examination under the Anglo-American system, are neglected when these wit-

³Garraud, *Precis de Droit Criminel*, 844.

nesses are concerned. This is in striking contrast to the judge's attitude toward the defendant. He is sceptical concerning almost everything the defendant says, and the examination of the accused goes into every detail of the crime and almost every detail of the man's life and is consequently usually long, involved, minute and one-sided. During this examination the president occasionally makes remarks concerning the effect of the testimony—remarks sometimes playful, sometimes doubting, sometimes ironical, and sometimes sceptical. All this has its effect upon the jury. I remember one interesting case of the *crime passionnel*. The defendant's first name was Carmen, and the president, whenever he had occasion to refer to her, called her by her first name in a tone of voice which reminded a person of the Carmen of the opera. Indeed, at one time, the judge specifically made the comparison. This, of course, is highly prejudicial. The minds of the jury are influenced and the outcome of the trial (except in a case of the *crime passionnel*, where the jury is not often affected by anything the judge says), is almost certain to be against the defendant regardless of the evidence—unless, indeed, the conduct of the president produces a revulsion of feeling and the prisoner is acquitted by the jury as a demonstration of power.

The active part the president takes in the trial leads to another result: the dignity of the court suffers. Disastrous consequences flow from this.

After the examination of the defendant, the president calls in the witnesses. They should present a complete case for the prosecution and the defence; but they do not do so. The *dossier* is the complete case, and, although the jury is not informed concerning all the matters in the *dossier*, it is constantly told to take cognizance of it—a practical impossibility. The president has a list of the witnesses for the prosecution and for the defence. Both the witnesses and the order of their appearance on the list are determined by the *avocat general*—the district attorney—in accordance with article 317 of the *code d'instruction criminelle*. Article 321 of the code further provides that the witnesses for the prosecution shall be called first. The president, however, calls on whomever he pleases and in the order he pleases. The case presented for the prosecution is usually, if not always, not comparable in order to that presented under the Anglo-American system. Our system conduces to harmony and beauty in presentation, as well as to clearness and power. The French system, in

spite of the natural clarity of the French genius, affords features which are not in accord with the French character. The examination and cross-examination of the defendant have produced the first rift in the lute of order. The jumbled examination of the witnesses completes the destruction of the instrument. The lack of those rules governing the presentation of evidence which are strictly binding in the Anglo-American procedure, and the method of deposition which allows the witness to tell his own story, are further causes of the lack of an orderly progression of evidence. This does not mean that the facts are not brought out, but simply that the system does not allow of a clear presentation of the case to the jury. But, at least, an æsthetic case could be developed if the president employed skill and art.

Theoretically, and this works out in practice, the attorneys in the case have no right to examine or cross-examine the defendant or the witnesses. They may, at the discretion of the president, ask questions through the medium of the court: and sometimes, when the president is tired, or is well disposed toward the particular attorney, direct questions are permitted. But questioning in a French court of justice, except by the president, is a rare occurrence.

Under our American system, the cross-examination is the most important feature of a trial. It not only occupies a large part of the proceedings, but it is most vital in the ascertainment of truth. Without cross-examination an American trial would be a misnomer. It is for this reason among others that I call a French trial a misnomer. There is no actual trial of the case. There is no sifting of the truth from the untruth, no analysis of the testimony of the witnesses. There is simply presentation of the facts and of all sorts of things which are not facts; there is exposition, narration, psychologic analysis, especially in considering the facts which lead to attenuating circumstances in the case. Argumentation is rare, and the discussion of evidence is almost unknown. *A priori*, it would seem that a trial could not bring out the true facts without cross-examination; and *a posteriori*, after having witnessed many trials in French courts, I am decidedly of the opinion that cross-examination, as it is practiced in our courts, is the *most vital safeguard* of the defendant and should be cherished by society. It should be a right, and not, as under the French system, a matter in the discretion of the president. Moreover, it should be a right exerciseable directly, and not through the president. One of the

most surprising things in a French court is to see witness after witness come to the stand, give his deposition—the testimony of a witness is not brought out by question and answer, but by narration by the witness of the facts as he sees them—and retire. The president sometimes asks a question in order to obtain an explanation of some of the testimony, but this seldom happens. The district attorney hardly ever asks any questions. The attorney for the defendant, who ought to be on the alert and interested, seems utterly oblivious of the power of cross-examination.

The fact that the theory of the law and the practice are against cross-examination makes the French attorney less sharp in detecting erroneous statements and less anxious to correct the misstatements which are often made. And consequently, astounding statements are made and there is no effort on the part of anyone in the court-room to discover the sources of the witness' knowledge, or his capacity or desire to give testimony which is true. All that can be said in defence of this procedure is that an attorney may ask questions through the president; that although this is awkward and trammeling, cross-examination can nevertheless, with limitations, be resorted to; that the law of 1897 allows a contradictory procedure before the *juge d'instruction*; that this procedure permits an attorney to advise his client and be present at the time of the examination before the *juge*; that, although as a matter of law, the attorney has no right to cross-examine or even to speak without the permission of the *juge*, yet being present, he may, to a certain extent, influence the *juge* to consider certain evidence and to neglect other evidence, and may even be allowed by the *juge* to examine the witnesses—a thing which though perhaps never done, is, nevertheless, in theory, possible; and finally, that because of all the foregoing, there is a sort of approach to a presentation of the other side. This is an extenuation, but nothing else than that.

One more word must be said about cross-examination. I am informed that on occasion, though rare, there is such examination, and it is as prolonged, as direct and as searching as could be wished. Moreover, the lack of it may be partially explained on the ground that as a rule there is no dispute as to the facts of the alleged crime because the defendant has admitted his guilt and the trial is merely a proceeding to establish the attenuating circumstances which will lighten the penalty. But even so there ought to be room for dispute concerning the facts in aggravation or

extenuation of the crime, and cross-examination should be a powerful instrument in the settling of that dispute.

The *avocat general*, just as our district attorney, is, in theory, a *quasi-judicial* officer. But whereas our district attorney is, in practice, usually nothing more than a prosecuting officer and seldom retains his *quasi-judicial* character even during the investigation of the case prior to trial, the French district attorney does retain that character throughout the case. It is delightful to see him, sometimes proceeding forcefully against the defendant, and at other times, when the case demands it, working on the side of the prisoner. In a large proportion of cases his leniency is very marked, and though he does demand the conviction of the defendant in ninety cases out of a hundred, even then he generally asks the jury to apply the doctrine of attenuating circumstances. Contrary to our procedure, he does not examine the defendant or the witnesses, and, though he has the privilege of asking questions through the president, he rarely avails himself of it. His opportunity comes upon summing up, when he delivers what is called the *requisitoire*. This speech is based not so much on the facts as they have been brought out during the trial, as on the *dossier* which has come up in writing. The district attorney and the attorney for the defendant, as well as the president, have read the *dossier* before the case comes to the *Cour d'Assises*, and it is upon the basis of the knowledge thus acquired that they make their summing-up addresses. This enables them to prepare the speeches before trial, a thing which is, of course, difficult under the Anglo-American system. One would think that as a result of this, a French attorney's address would be better than that of an American lawyer. After having witnessed many cases both in France and America, I incline to the opinion that our addresses are no less sound than those delivered in a French court of justice. The French are good at exposition, narration and psychological analysis. The work that they have to do lends itself to these three qualities. The speeches usually set out the facts of the crime and the facts of the defendant's life. In order to do these two things, the art of description and exposition, and the art of psychological analysis must be cultivated. When I come to discuss the doctrine of attenuating circumstances, the reader will see why psychology is a necessary element in the trial of a French case. Americans, on the other hand, show a readiness of wit which is not called for in the summing up in a French court. They are, furthermore, powerful in

the discussion of evidence and in argument. The form of the addresses is, however, not so good as that found in the French speeches. This is attributable to four reasons: first, to the fact that the matter with which the French lawyer has to deal lends itself to beauty of form; second, to the fact that the French lawyer is able thoroughly to prepare his address because he need not depend upon the facts as they come out in court, but may depend absolutely upon the *dossier*; third, to the better education of the French lawyers; fourth, to the French instinct for beauty. We are direct, heavy, often rough and uncouth, depending rather upon facts than upon their æsthetic presentation, depending rather upon force of stroke than upon persuasion through beauty. We do well, however, considering that our summing-up speeches come immediately after the presentation of the evidence and that this evidence, in large part, is unknown to the attorneys before the trial of the case.

The French district attorney may appeal to the *Cour de Cassation*. Under our procedure he may appeal on matters of law before trial if, for instance, he is defeated in a question pertaining to the indictment; but once the case goes before a jury he is barred from any appeal, no matter how meritorious the case may be. It may be sound not to allow the findings of fact of a jury to be disturbed, but when the laws themselves have been violated there would seem to be no reason for denying the state the protection of an appeal.

The *partie civile*—the complainant, or someone wronged by the crime of the defendant—has a good function in a French trial. He is an aid to the district attorney; the court is enabled to dispose of the civil action and the criminal one at the same time, for it can, while convicting the defendant, award damages to the *partie civile*; and, since the *partie civile* may be compelled to pay the costs if he does not prove his case, there is a diminution in the number of cases brought on false charges. It is to be noted, however, that the complainant or other person entitled need not become a *partie civile* unless he so desires and, of course, if he is not a party, he is not liable to an assessment of costs. The fact that the French, with their high regard for personal liberty and their distrust of the state and its agents, allow a *partie civile* can perhaps be explained on the ground that the common practice in France of appointing exceptionally strong counsel for the accused with a consequently forcible defence of the prisoner's rights, has led to a realization that, if the forces of the opposing sides are to be even, the district attorney must be allowed to receive aid from private counsel.

The position of the attorney for the defendant is very different in France from what it is in this country. He has not the same standing in court; and in a conflict between himself and a witness, the president usually sides with the latter. In America, the opposite is the case. The attorney has great power over the witness and is always enabled to ask a direct question and demand a direct answer. Not only is the right of cross-examination denied in France, but, there, because of the theory of the deposition, the witness may wander over a great many fields or restrict himself within certain fields as he desires. I had an illustration of this in one of the cases I saw tried. The attorney, in a feeble attempt at cross-examination, which was really an attempt to blacken the character of the witness, asked questions concerning the previous history of the witness, especially the work that he had been doing in Austria and in Germany. The witness refused to answer any question which he considered irrelevant to the subject at issue, namely, whether money had been stolen by the defendant at bar. Counsel insisted upon getting answers to his questions, and the witness persisted in refusing to reply. The queries of the attorney would have been ruled admissible even in this country, as tending to attack the credibility of the witness, yet in spite of the French practice of allowing anything to go in, the court ruled, "the witness says he will not answer any questions not referring to the matter at issue, and I can do nothing". The attorney protested to the president, and presented his "conclusions"—a statement of the questions that he had asked, of the fact of the refusal of the witness to answer, and a demand that the court punish the witness for not answering. Despite the fact that the French code provides for the compelling of a witness to answer a proper question, the president—whatever the reason may have been, whether political or otherwise—refused to accept the attorney's conclusions. Compare this proceeding with that in an American court where the judge would consider the evidence, rule upon its admissibility or inadmissibility, and both parties would thereby become bound to abide by the ruling or be found guilty of contempt of court.

The strong position occupied by a witness in a French court is the result of over a century of revolution which has made individual liberty highly prized. The Comte de Franqueville, in his interesting and valuable discussion of the English system of criminal trials, makes a palpable hit when he criticizes the harshness of the cross-examination. Under that system, which is our own, the

blackening of character, the terrorizing of witnesses and the frightening of them away from court to escape the merciless inquiry into character, is a scandal. The French theory is that the witness shall be free in, as well as out of court. The French have suffered too much from arbitrary judges.

The questioning by the attorney, when there is any questioning at all, is limited usually to one or two inquiries. It sometimes happens that the attorney repeats the answer of the witness to the jury—a thing which is not at all unknown in an American court. Again, he interprets the testimony that has been given by a witness, interprets it immediately after the testimony has been given, and even argues matters presented in the testimony while the witness is still on the stand. In addition to all this, argumentative questions are frequent. Such interrogations would not be rare in the American courts if the judges allowed them; they are extremely tempting.

The case with which attorneys for the defendant swallow a great deal of the evidence presented, is a remarkable feature of a French trial. It is not within the province of this article to attempt to consider all the causes of this, but it may be interesting to note that there are three main reasons for the gullibility. The first is the fact that there is little or no cross-examination; the second, which is in part the cause of the first, is that, in view of French character and French history, if an attorney berated a witness or put him through a hard cross-examination, the jury might readily turn against the attorney; and the third lies in the fact that the sort of judicial determination of questions which has been made by the *juge d'instruction* receives a great deal of respect in the higher court. It is this last mentioned reason which in large part accounts for the scant discussion of evidence and the lack of conflicting testimony in the *Cour d'Assises*. If the attorney for the defendant attempted to discredit or disprove the evidence in the *dossier*, he would be met with coldness. Truly, the *dossier* is the primary evidence and the testimony brought out in the *Cour d'Assises* is only secondary. The effect of this practice upon the jury has already been indicated.

Even expert witnesses are not examined by the attorneys for the defendant, and the gullibility of the lawyer, the unquestioned acceptance of the testimony adduced, the awe of the findings of the *juge d'instruction*, all lead to curious and sometimes disastrous results. An expert witness in the French court is always a state witness, for France does not recognize private expert witnesses.

He makes a thorough investigation and then writes out his report. If he is not present at the trial, this report is read; if he is present, he makes his deposition and explains what he has found to the jury. Wild statements go unchallenged, the prisoner's attorney simply smiling and asking no questions.

In fact, the only part taken by the prisoner's counsel during the proceedings is in the exercise of his right to discuss the testimony of a witness immediately following the giving of that testimony, and in his summing up and rebuttal. The summing up address has been previously referred to and is based chiefly upon the facts in the *dossier*. Prisoner's counsel's address is a combination of discussion of the facts of the crime, of narration of the defendant's life, of expression of personal opinion concerning the innocence of the defendant, of the presentation of the attorney's personal testimony in favor of the defendant, and of the bringing forward of other testimony not included in the *dossier*. Once in a while you hear an interpretation by the prisoner's counsel of the facts presented, different from the interpretation given by the district attorney. The disorder of the whole proceeding is marked. In this country counsel may not express his personal opinions or introduce evidence which has not been given under oath and subjected to cross-examination. The attorney for the defendant in a French court has a right to say what the defendant has told him, what letters the defendant has written him, and, in fact, anything he pleases. I have seen this happen often and have never heard any objection made by either the district attorney or the president.

Following the summing-up speeches, the attorneys for both sides have an opportunity for rebuttal, the district attorney preceding the defendant's counsel. This is more just than our system not only because it gives the prisoner's attorney an opportunity to rebut the arguments of the prosecuting officer, but also because it allows the defence to have the last word.

The striking feature adverted to above, that in a large percentage of the cases which come before the *Cour d'Assises* the defendant pleads guilty, is perhaps to be accounted for by the procedure in the preliminary stages before the *commissaire de police* and the *juge d'instruction*, and by the French theory that the defendant has no right to conceal anything, but must answer all questions put to him by the *commissaire* and the *juge*. It may be that this procedure conduces to the telling of the truth. At all events, since the prisoner usually admits his guilt, there is very

little time spent by prisoner's counsel in talking about the facts concerning the commission of the alleged crime, almost all effort being devoted to explaining the reason for its commission. And it is this explaining of motives which is the outstanding feature of a French criminal trial.

The whole doctrine of attenuating circumstances now comes to the fore. This doctrine was brought into French law in order to mitigate the rigors of the Napoleonic Code, and to take away from the judges their power of sentencing in their own discretion. The law being so rigid, and the punishment so severe, juries constantly broke the law and acquitted the defendant even though the facts charged in the indictment had been proved. In 1824, Parliament took notice of this condition of affairs, and although the code itself was not changed, the judges were given the right to mitigate the punishment upon the determination by *them* of attenuating circumstances. The juries, however, distrusted the judges and continued to acquit in spite of the evidence. And so, in 1832 another law was passed, which gave to *the jury* the right to determine the existence or non-existence of extenuating circumstances. At the present time, the jury decides whether the facts charged in the indictment have been proved, and also whether there are any attenuating circumstances in the case; but the law lays down for each particular case the punishment that is to be meted out to an individual who is found guilty with attenuating circumstances. The jury, then, is informed of what will happen to any one if he is so convicted, and the law has taken the place of what was considered by the jury to be the arbitrary judgment of the judge.

This doctrine is, of course, sometimes used for improper purposes. In cases of the *crime passionnel*, the Parisian jury, acting differently from the provincial juries, has for the last forty years acquitted on the theory that the attenuating circumstances in the case so refine the act charged in the indictment as to annihilate it. Of course, this is a violation of the law, just as there is similar violation when our own juries acquit under the same circumstances. The jury in such cases, having found the facts to be true, should convict, and, if they consider that there are attenuating circumstances in the case, they should so determine. The judge would then mete out the punishment indicated by the code. Generally, however, the doctrine is not so misused even though called into play by the attorney for the defendant in every case, and applied by the jury in almost every case.

What does the doctrine amount to? Simply this: that the individual has committed a crime under such conditions as to mitigate the enormity of the offense. Conditions which would accomplish this are many and varied. They may apply to the actual commission of the act, or to facts occurring at any time before or after its commission. The whole life of the defendant is, therefore, laid before the jury in order that it may see all the circumstances and motives which have conduced to the perpetration of the crime. It is easy to see that this proceeding which not only considers the individual at a particular time, but also considers his evolution and heredity, is really a psychologic and sociologic study, rather than a juridical one. And it is easy to see, also, that it is not difficult to find attenuating circumstances in almost every case; and all the more is this so when the question is left to a jury.

The tendency of the jury to apply the doctrine when the mitigating circumstances are few and light, but to refuse to apply it, that is, apply it not wisely but too well, and to acquit if the attenuating circumstances are vital, leads to catastrophic conclusions. The jury reasons that the more corrupt the defendant's heredity, the more untoward his circumstances of life, the more fetid and deteriorating his environment, the more is the enormity of his offense reduced and the greater is the call for an acquittal. From the social viewpoint the reverse is the truth. The greater the number of attenuating circumstances in a case, the more is the individual unfit to resume his place in society, and the greater is the necessity for sending him to a proper institution for care. And even in the other cases, where the jury has considered the circumstances to be somewhat extenuating and the judge has sentenced the defendant to a shorter term in prison, the prisoner is not usually fit, at the end of this shorter time, to resume his place in society. He ought rather to be sent to an institution for further care. In actual practice, therefore, the doctrine of attenuating circumstances is apt to work out to the disadvantage of society, and, in fact, against the real welfare of the prisoner himself.

If the French system cannot stand without the application of the doctrine, then at least the jury should be limited to the determination of the existence of attenuating circumstances, and the individual, if convicted, should be sent to an institution, there to be cared for until he is fit to return to society. Again, a distinction ought to be drawn between attenuating circumstances;

for, some ought to lead to early liberation of the convict, and others to later liberation. At present, no such distinction is made. The code treats every case alike, and looks not to the individual but to the crime he has committed. The punishment, therefore, is meted out merely according to the quality and gravity of the crime, and is not measured by the crime and the particular set of attenuating circumstances taken together. When one considers the difficulty of determining the existence of attenuating circumstances, particularly in cases of the *crime passionnel* where the facts are so intangible, so subtle and so complicated, and where the questions involved are psychologic, social, biologic and philosophic, it seems foolhardy to leave even that problem to the ordinary jury. The function of the jury in the scientific system should be merely the determination of whether the facts set forth in the indictment have been proved. The problem of the existence of extenuating circumstances should be left to a board of scientists, and it should be for them to determine what treatment is most desirable in the particular case. For such a board the governing principle would undoubtedly be that the greater the attenuating circumstances (in the sense in which I have been using these words) the longer the treatment necessary to fit the defendant for his return to society.

The French jury does not get a complete case such as we know it in America. Our theory and our practice is that everything admissible must be presented to the jury in order that it may determine the rights of the case. But in France such is not the practice, for the *dossier*, which contains all the evidence, is not read in court, and the jury must rely wholly on the evidence introduced in the course of the trial. Such evidence, however, is not that which is in the *dossier*, for some of the witnesses come and some stay away, and some are called and others are not. Moreover when a witness does stay away his deposition before the *juge d'instruction* is read to the jury without any of the precautions we take before admitting such testimony. There is no scrutiny of the testimony, because there is no cross-examination. The only evidence offered the jury of its validity is the fact that it has been presented to the *juge d'instruction* and that the *juge* has probably considered the matter from all sides. But as a matter of fact the *juge* has not considered both sides. He has not cross-examined. He presents a one-sided report and this report is read in open court.

Besides the lack of the safeguard of cross-examination, there is a lack of vividness in the presentation of written as contrasted with spoken testimony. The jury has a right not only to see the witness, not only to study his character while he is being examined and cross-examined, but also to be vividly impressed by the most forceful and concrete method of impression, namely, by testimony coming from the lips of the witness himself. The fact that the evidence is not presented in an orderly fashion; that there is no presentation of the case by the district attorney, followed by the case for the prisoner; that there is little examination and cross-examination or rebuttal followed by surrebuttal; that such examination and cross-examination as there is, may be jumbled, and that rebuttal may take place when a witness is giving his direct testimony, through the confronting of that witness with another witness; the fact that vital elements of the case sometimes do not come out because witnesses are absent and their depositions which are read do not create the impression on the jury which oral testimony and cross-examination would create—all these matters conduce to confusion in the minds of the jury concerning the elemental facts of the case.

To make matters worse, the jury, under the French system, is judge of the law as well as of the facts.⁴ This is surely unscientific procedure. In fact, if better judges could be secured, it would be advisable to abolish the entire jury system, except in cases of political offenses, of labor offenses and in the determination of questions of insanity. Jurors in France, due to the rules for jury service, are of a higher average intelligence than jurors in America, but the result even in France is not to the credit of the jury system. The fact that the case is not presented in as clear a fashion under the French procedure as under the Anglo-American system may account in part for this failure, but it is the jury system itself which is fundamentally at fault. Ordinary men who come from their businesses to consider such questions of fact as are presented to them in the courts of justice in the fashion in which these facts are presented, are not competent. And however bad it is to have a jury decide questions of fact, it is a great deal worse to have it decide questions of law. They are not technical men and cannot, under the circumstances, accurately pass on questions of law such as are presented to them for decision by the courts in France. Yet the *Cour de Cassation*, the Supreme

⁴*Code d'instruction criminelle*, Art. 337.

Court of France, has ruled over and over again that it will not interfere with the decisions of the jury and, except in a very few cases, that the jury has the right to answer the questions put to it by the president of the tribunal—and these questions involve not merely a determination of whether the defendant has committed the acts charged in the indictment, but also whether he has committed the *crime* therein charged.

A great deal of confusion in the minds of the jury is caused also by the French system of allowing every kind of evidence to be admitted. In this country we carefully guard the jury against the abuse of irrelevant testimony, and, though we do not succeed famously, at least we try hard. Our defect is in allowing in too little; the French fail in allowing in too much. When a witness comes to the stand in a French court, he is not directed by examination as to what he is to say, but is merely asked by the president to tell what he knows about the case. All the consequences of this are evident and natural. Under the theory of the law he is to express his opinion unaided and untrammelled, and he proceeds to do it in a most beautiful fashion! Testimony which is given of his own knowledge, of the knowledge of others, or even on the mere suspicion of others—all this is presented by the witness, and you cannot distinguish between the different sorts of testimony which he is offering. It is only in rare instances that the president of the tribunal attempts to determine what has been said upon the witness' own knowledge as distinguished from what has been said upon the basis of information imparted to the witness by other people. There is, therefore, no sifting of the valid from the invalid, of the weighty from the light, and even if such were the case, it would be very difficult for the jury to retain the distinction in mind. Just as there is no examination concerning the sources of the testimony, so there is none concerning the capacity of the witness to give the testimony. Under such circumstances the jury does not know and cannot possibly ascertain the weight which should be given to any particular piece of evidence.

From the foregoing, it is easy to see that criminal trials in France abound with hearsay and opinion evidence. These are two of the most prejudicial kinds of testimony that can be produced before a jury. Though they may do little if any harm when the body judging of the evidence is intelligent and independent, yet when the average jury is to determine the question involved, the damage may be incalculable. This is, of course, particularly true

where opinion and hearsay evidence are not only admitted but are allowed to go in without the jury's being informed as to the doubtful character of such evidence.

Take for instance the question of opinion evidence where a witness comes to give testimony concerning a murder. He tells the facts of the murder, and then is asked by the president whether the person murdered seemed to have been asleep at the time of the commission of the act. Whether or not a person is killed in his sleep is an extremely technical question, and yet here is an ordinary layman expected to express a sane and accurate opinion concerning that medical matter. We, on the other hand, go too far in restricting testimony in cases of opinion evidence, just as in cases of hearsay evidence. We also go to ridiculous extremes in promulgating rules to prevent such testimony, and then proceed by a liberal use of sophistry to allow by indirection what we deny directly.

Before leaving this branch of our subject, it is important to note that the French jury decides upon the guilt or innocence of a defendant and determines the existence of attenuating circumstances by a majority vote.⁵ This is better than our system since it avoids the many miscarriages of justice attributable in our courts to the necessity of unanimous concurrence. Throw safeguards around free expression and free defence, and then let a majority of the jury determine guilt or innocence: one muddleheaded or obstinate person can hold up the other eleven.

There is no stenographer in the French court. Indeed, article 372 of the *code d'instruction criminelle* expressly says: "*Il ne sera fait mention au procès-verbal, ni des réponses des accusés, ni du contenu aux dépositions, sans prejudice toutefois de l'exécution de l'article 318 concernant les changements, variations et contradictions dans les déclarations des témoins*" (which latter changes, variations and contradictions refer to the testimony of a witness and are noted by the clerk in long hand upon the direction of the president). Questions of fact are finally decided by the jury;⁶ appeals go up to the *Cour de Cassation* on matters of law,⁷ usually matters of form. Our higher courts, on the other hand, are the

⁵*Code d'instruction criminelle*, Art. 347.

⁶*Code d'instruction criminelle*, Art. 350. This statement is true in practice. In theory, however, the court may set aside the verdict of the jury when it has declared the defendant guilty, provided that the court is convinced that the jurors have been wholly deceived (*se sont trompés au fond*). *Code d'instruction criminelle*, Art. 352.

⁷*Code d'instruction criminelle*, Art. 373.

final arbiters even of questions of fact. When the whole record goes up before them, they may see whether justice has been done. If we in America changed our procedure to the extent of doing away with reversals because of technical objections and established as a fundamental principle that no case could be reversed save where injustice had been done, the whole record would be an invaluable aid to the administration of law. At the present time, however, our courts tend to go through the record with a fine comb for technical objections which have nothing at all to do with the fundamental merits of the case, and consequently, the record is often an instrument for the accomplishment of injustice rather than of justice.

Before I went to France, I was entirely disgusted with our American procedure. The attitude of the courts and especially of the attorneys had made me completely antagonistic to our system of evidence as it was in operation. After having seen the practical working out of another system, so distinct from ours, I have come to recognize the value of rules of evidence and the advisability, indeed the necessity, the beauty and the harmony of the Anglo-American system of evidence. We must, however, attempt to get rid of the rubbish around the law, for at present the rules of evidence are subject to so illiberal and rigid an enforcement, and proof of certain facts is so restricted, that no intelligent idea of a case as a whole can be obtained. It would seem wise, therefore, to appoint a committee of say three experts whose task it should be to revise the law of evidence, retaining the broad, fundamental principles which lead to the ascertainment of the truth and dispensing with the baggage which has accumulated in the course of years.

We might do well also in allowing our judge some of the power granted the president of a French tribunal in the conduct of a trial. Our judge has lost the dignity and the power of the English judge, and we must restore to him what we have taken away. He is a man with a technical training and, in addition, has had at least as much experience in life as the average jurymen. He is certainly fitted, therefore, to weigh and sift the evidence presented before the court, and, consequently, should be given not only the right to expound this evidence, but also to comment upon its weight.

The judge can certainly hold the questioning within the issue. He should allow no excursions and no unnecessary prying into the private lives of the witnesses; the cross-examination should thus be limited, and the character of the witnesses protected. What is

now a reproach to our law should be removed. On the other hand, witnesses ought to be allowed to speak more freely, and, in this respect, we should do well to take a leaf out of the book of the continental system. The stupid and maddening restriction of the answer of a witness to a "yes" or a "no" should be sent into limbo, and the witness should be allowed by the judge to give explanations unhindered to the extent to which he is hampered at present by the cross-examiner. The judge's discretion should be the guide and the final arbiter, and he should not be reversed except where he has been guilty of a flagrant abuse of this discretion. Before, however, such a scheme can be properly carried out, the attitude of the superior courts must change materially, so that the trial judge need not labor under constant fear lest a mistaken ruling on a minor point will lead to a reversal of judgment and a retrial.

Under our Constitution, the defendant cannot be compelled to testify against himself and, therefore, he cannot be made to take the stand. It would, however, be perfectly constitutional to provide that failure to testify might be the basis of an inference of guilt. Such is the rule in New Jersey today and also in Great Britain and Australia. There the judges may charge the jury that inferences may be drawn against a defendant who stands mute during the trial. Such a system would be conducive to the ascertainment of the truth.

The administration of justice would be further aided by a combination of the French and the American district attorneys. That is, it would seem advisable for our district attorneys to be, in practice, as well as in theory, *quasi-judicial* officers during the investigations prior to trial, but to be merely prosecuting officers during the trial itself. This would insure a fair and adequate investigation, a thing which is impossible under our present system; and would, at the same time, provide, through the presentation of strong evidence on one side and strong evidence on the other, for that conflict and clash which is essential to the bringing out of the truth.

Although our system of recommendation of mercy by the jury to the judge is, I believe, more logical and practical than the French theory of attenuating circumstances, yet even our procedure is defective in that the judge is allowed to determine what shall become of the individual convicted. The average judge is not a competent person for such a task. A board of parole having cognizance of all the facts is the proper body. Of course a judge has,

because of our probation system, the opportunity of finding out the past history of the defendant and of basing his sentence thereon. But this could be accomplished even more satisfactorily by the board of parole, specializing and devoting all of its time to the particular task.

We Americans must, if we wish to have a workable system of criminal law, secure better jurymen. This may be accomplished in two ways; first, by raising the standards of eligibility for jury service; and second, by allowing exemption from this service only to those who are indispensable to the work of the body politic outside of the jury room.

The lax administration of our criminal law which often approaches the scandalous must end, and the delays and mischances due to the medieval technicalities which burden our system must be abolished. We must prosecute and we must convict. And finally, the elevation of our Bar and the elimination of trial by newspaper through a liberal use by the courts of their power to punish for contempt are prerequisites to the effective working out of any system whatsoever.

ROBERT FERRARI.

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JANUARY, NINETEEN HUNDRED AND EIGHTEEN.

NOTES.

STOCK DIVIDENDS AS TAXABLE INCOME.—A owns a number of shares in a prosperous corporation which has made a large amount of money, but as yet the directors have not seen fit to distribute it among the shareholders. If A knows anything about the affairs of his corporation, he will appreciate fully his advantageous position, and will part with his certificates only for a sum which reflects the value of his share of the accumulated funds. At this point the directors decide that the money can be used for the purposes of the business to good advantage; it may in fact be already invested in permanent improvements so that it cannot

readily be realized for distribution. As a perfectly legitimate operation, new stock is issued equal in par value to the whole or part of the surplus, and distributed *pro rata* in place of cash to the shareholders,—for convenience being called a "stock dividend". A is perfectly satisfied; he is in no need of the cash now, and if he should be later, he knows he can find a ready market for any or all of his holdings. But the income tax collector informs him that he has received an income of, say, \$100 for each of those new shares. "\$100" is printed on the face of the certificate and A certainly would not sell it for less than that sum; "\$100" is also printed on the face of the old certificate and A certainly would not sell that for less than that sum. But the old share would have sold for more than \$200, a month ago. Has A, then, received an income through the issuance of the stock dividend?

In the Federal Income Tax Law of 1913¹ no reference is made to stock dividends, but under § 2A, subd. 2² of the same act, the Treasury Department issued instructions that they were not to be treated as income for purposes of taxation.³ These instructions were subsequently reversed so as to tax the dividends as income for their "cash value".⁴ Such departmental rulings are, of course, merely administrative, for the statute alone determines what is income to be taxed.⁵ In the recent case of *Towne v. Eisner* (D. C., S. D. N. Y. 1917) 242 Fed. 702, the plaintiff had received stock dividends issued by a corporation out of earnings made previous to March 1, 1913.⁶ The court held that he was liable for the tax on a sum equal to the par value of the new shares. An appeal has been taken to the Supreme Court where the case will be heard in the present term. Two points are involved: whether or not stock dividends are income under the statute; and, if so, are they taxable out of money earned prior to March 1, 1913? This second question is beyond the scope of the present writing.⁷

Stock dividends have been considered many times in cases where a trustee holds the parent shares, and both the life tenant and the

¹38 Stat. 166, c. 16, § 2 A, subd. 1. "there shall be levied * * * upon the entire net income arising or accruing from all sources in the preceding calendar year * * * a tax of one per centum per annum * * *."

²"Every person subject to this additional tax shall * * * make a personal return of his total net income * * * under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury."

³T. D. 2163, February 18, 1915. "Stock dividends issued as a *bona fide* and permanent increase of the capital stock of corporations * * * without intent to evade the imposition of the personal income tax, are held to represent capital; and are not subject therefore to the income tax as gains, profits and income in the hands of stockholders."

⁴T. D. 2274, December 22, 1915. "Stock dividends paid from the net earnings or the established surplus or undivided profits of corporations * * * are held to be the equivalent of cash, and to constitute taxable income under the same conditions as cash dividends."

⁵*Edwards v. Keith* (C. C. A. 1916) 231 Fed. 110.

⁶38 Stat. 168, c. 16, § 2 D. "for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first * * *." The reason for this provision lies in the fact that the Sixteenth Amendment was not signed until February 25, 1913.

⁷This question will be considered in a subsequent number of the Review.

remainderman claim the new shares.⁸ The conclusions arrived at in the different jurisdictions are hopelessly irreconcilable, but it is not at all necessary to take sides in the controversy, because it is plain that the considerations involved in this question are quite different from those involved in the question whether or not the stock is to be taxed as income. Where the earnings are all accumulated during the life tenancy, it may be entirely equitable to give them to the life tenant, but that fact has no bearing at all on the question whether or not they are income for purposes of taxation. This is shown in a most striking manner by the case of *Trefry v. Garfield* (Mass. 1917) 117 N. E. 904 which arose under the Massachusetts Income Tax Law. The court there decided, as in the Towne case, that stock dividends were income for taxation; and this despite the fact that Massachusetts is one of the jurisdictions which hold that, regardless of the source of the earnings, such dividends are not income for the life tenant.⁹ These cases between life tenant and remainderman do, however, aid in the solution of the present problem in so far as the decisions contain analyses of the nature of a stock dividend.¹⁰

If a share of stock or piece of real estate has risen in value but has not been sold, can it be said that the owner has received an income equal to the increase in value? In case of a fall in the realty market or serious reverses in the affairs of the corporation, the owner may never have received a dollar of these "paper profits". It is entirely possible for a man to grow richer without any income. As would be expected, the Treasury Department does not assume to tax this appreciation in value.¹¹ Nor is there any need that they do so, for, ever since the law went into effect, gains made on the resale of capital assets have been subject to the tax.¹² Wherein does the position of the recipient of a stock dividend differ from that of a holder of property which has increased in value? Of course he has received something new from the corporation; but what is the real value of these new pieces of paper? Except for a change in the legal status of the fund, the new shares plus the old shares represent exactly the same thing that the old one did before. Here a tax is being levied on a so-called distribution of earnings when the transaction really

⁸16 L. R. A. 461.

⁹*Minot v. Paine* (1868) 99 Mass. 101; *Gardiner v. Gardiner* (1912) 212 Mass. 508, 99 N. E. 171.

¹⁰*Gibbons v. Mahon* (1890) 136 U. S. 549, 10 Sup. Ct. 1057 is by far the most instructive of these cases, the Court holding that stock dividends are capital rather than income.

¹¹"any appreciation in the value of assets due to appraisal or adjustment and taken up on the books of the individual or corporation is held not to be income within the meaning of the law until such appreciation as a result of a completed, a closed transaction, has been converted into cash or its equivalent, that is, has been realized as an addition to and a part of the tangible assets of the individual or corporation. A book entry reflecting only an enhanced value of assets during the year evidences an increase in the net worth of the corporation or individual for that year, an increase which, under adverse conditions, may disappear the next year. An increase in value thus evidenced is intangible, unstable and is not such income as the federal income tax contemplates shall be returned for purposes of the tax." Letter to Collectors, August 14, 1914. Corporation Trust Company's Income Tax Service § 260.

¹²Montgomery, *Income Tax Procedure for 1917*, at p. 18 *et seq.* This seems to be contrary to the English practice. See 17 *Columbia Law Rev.* 149.

has the effect of putting them where they cannot be distributed. It is true that the share plus its cash dividend represents in value what the share did before, but in such a case a *separation* has taken place between capital and its fruit. That is all that is contended for, a separation. It is not maintained that actual money need be distributed. Where Liberty Bonds were given out instead of cash dividends it was entirely correct to call them income.¹³ And in a case such as *Trefry v. Putnam*,¹⁴ where the court held that money received from the sale of stock rights was taxable income, the separation has been consummated and the stockholder has something else in place of his new share.¹⁵ In waiting for a separation, there is no question of the government being deprived of its revenue; when the owner parts with the shares he is taxed for any gain. If the earnings are reserved by a corporation to defraud the government, ample power is given in the act itself to deal with the situation.¹⁶

In the new Income Tax Law of September 8, 1916¹⁷ and the amendment of October 3, 1917,¹⁸ stock dividends are expressly included under "income". The instant cases, therefore, could not arise in their present form under these statutes. The only question would be one of constitutional interpretation, involving the term "income" as used in the Sixteenth Amendment, and as constitutional wording must in its very nature be general, it would be a narrow view not to allow stock dividends to be taxed as income when expressly named. But in the instant cases, although it is easy to understand why the courts decided as they did since as a practical matter business men would consider stock dividends as so much profit-distribution, yet it is submitted that on closer analysis such dividends are not income, and should not be taxed as such.¹⁹

¹³Decision of Attorney General Gregory, July 27, 1917, Corporation Trust Company's Income Tax Service § 2279. Where a promissory note is received during the year, not however as part of a dividend, it may be correct to include it under income as was directed by Deputy Commissioner Speer in his letter of March 1, 1915, Corporation Trust Company's Income Tax Service § 242, but it might have been better to wait until the money was paid, instead of leaving the promisee to a more or less questionable remedy in the form of a rebate for loss in the subsequent year in case the note should not have been paid.

¹⁴(Mass. 1917) 116 N. E. 904. This case was argued and decided with *Trefry v. Garfield*, *supra*.

¹⁵The same result is obtained under the federal law. Letter from Deputy Commissioner Speer, February 27, 1915, Corporation Trust Company's Income Tax Service § 287.

¹⁶38 Stat. 166, c. 16, § 2 A, subd. 2 provides for the tax on profits withheld for the purpose of evading the tax.

¹⁷39 Stat. 756, c. 463, Title I, Part 1, § 2 (a). "the term 'dividends' as used in this title shall be held to mean any distribution made * * * by a corporation * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen and payable to its shareholders, whether in cash or in stock of the corporation. * * * which stock dividend shall be considered income, to the amount of its cash value."

¹⁸War Revenue Act of October 3, 1917, § 1211 reads: "which stock dividend shall be considered income, to the amount of the earnings or profits so distributed."

¹⁹For a general discussion of the subject, the reader is referred to the excellent chapter on Stock Dividends in Montgomery, *Income Tax Procedure for 1918*.

CONSTITUTIONAL LIMITATIONS UPON THE SERVICE OF FOREIGN CORPORATIONS.—The service of foreign corporations, in actions *in personam*, presents two distinct constitutional questions: *first*, is the corporation within the jurisdiction so as to be subject to process; *second*, does the service of process constitute due notice to the corporation of the pendency of the action?¹

In order that a court may render a personal judgment it must secure jurisdiction of the person of the defendant.² In the case of natural persons the problem is comparatively simple. The general rule may be stated as follows: where the defendant is a resident of the state in which suit is brought, actual or constructive service may confer jurisdiction on the court regardless of whether the defendant is within or without the state; where he is a non-resident, he must be served personally within the state.³ Furthermore, service on the agent of a non-resident principal is not considered service on the principal.⁴

When, however, a corporation is defendant, difficulties arise, for a corporation cannot enter a state other than that in which it is incorporated, and it must, moreover, always act through agents.⁵ It is generally held that the mere presence of agents in a foreign state does not bring the corporation within the jurisdiction.⁶ It must appear that the corporation is "doing business" within the state.⁷ The adoption of this test constitutes nothing more than a just and logical application to corporations of the general rule that physical presence is the basis of jurisdiction in personal actions against non-residents.⁸

¹See *St. Clair v. Cox* (1882) 106 U. S. 350, 1 Sup. Ct. 354; *St. Louis, S. W. Ry. v. Alexander* (1913) 227 U. S. 218, 33 Sup. Ct. 245.

²See *Buchanan v. Rucker* (1808) 9 East 192; *Picquet v. Swann* (C. C. 1828) 19 Fed. Cas., No. 11,134; *Pennoyer v. Neff* (1877) 95 U. S. 714.

³See *Pennoyer v. Neff*, *supra*; 17 Columbia Law Rev. 441.

⁴*Moredock v. Kirby* (C. C. 1902) 118 Fed. 180; *Cabanne v. Graf* (1902) 87 Minn. 510, 92 N. W. 461; *cf.*, *D'Arcy v. Ketchum* (1850) 52 U. S. 165.

⁵See *Ex parte Schollenberger* (1877) 96 U. S. 369.

⁶*St. Clair v. Cox*, *supra*; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* (C. C. 1887) 32 Fed. 802; *Clews v. Woodstock Iron Co.* (C. C. 1890) 44 Fed. 31; *Smithson v. Roneo* (D. C. 1916) 231 Fed. 349; *Newell v. Great Western Ry.* (1869) 19 Mich. 336; *Crook v. Girard Iron Co.* (1898) 87 Md. 138, 39 Atl. 94; *contra*, *Pope v. Terre Haute Car Mfg. Co.* (1881) 87 N. Y. 137; *Sadler v. Boston & Bolivia Rubber Co.* (1910) 140 App. Div. 367, 125 N. Y. Supp. 405; see *Jester v. Steam Packet Co.* (1902) 131 N. C. 54, 42 S. E. 447.

⁷*Riverside Mills v. Menefee* (1915) 237 U. S. 189, 35 Sup. Ct. 579, and cases in footnote 6, *supra*.

⁸As was said by the court in *Good Hope Co. v. Railway Barb Wire Co.* (C. C. 1884) 22 Fed. 635, at p. 636:

"When a corporation has so far identified itself with a locality beyond the state of its creation and domicile as to be found there for practical business purposes, it is reasonable to treat it as there also to respond to its obligations when called upon to do so in the courts of that locality."

The earlier cases in this country attempted to justify the adoption of the "doing business" test on the theory that, since the state could exclude the corporation, it could make consent to service upon the corporate agents a prerequisite to admission. See *St. Clair v. Cox*, *supra*. But as a matter of fact service on the corporate agents is upheld where the state cannot exclude the corporation and where consequently the theory of consent as a prerequisite to admission has no application. *International Harvester v. Kentucky* (1914) 234 U. S. 579, 34 Sup. Ct. 944.

No very exact definition can be given as to just what will constitute "doing business",⁹ and each case must stand on its own facts.¹⁰ The courts seem, sometimes, to have drawn a distinction between ordinary agents and general officers such as the president. They say that when an ordinary agent is served the business must be a systematic and regular series of transactions,¹¹ whereas when a general officer is served, the mere presence of such an official on a single business transaction is sufficient to constitute "doing business".¹² This distinction, however, has not been unanimously adopted, for in some jurisdictions the test applied to general officers is the same as that applied to ordinary agents.¹³ The dual standard may, perhaps, be justified on the ground that, since the whole doctrine of the presence of a corporation in a foreign state rests upon a fictitious basis, the final test should in each case or class of cases be based on practical considerations of policy and not on the strict application of theoretical principles. Certainly, on theory, the dual test would seem inconsistent; for it renders jurisdiction in the one case dependent on the nature of acts constituting "doing business", in the other, on the authority of the person conducting the transaction. Moreover, to adopt the latter test is to confuse the problem of what constitutes presence within the state with the problem of what constitutes due notice; and, as was stated above, these problems are distinct.

Assuming that the corporation is "doing business" within the state, any person may be served, notice to whom would reasonably constitute notice to the corporation.¹⁴ Thus service on a general officer would constitute such notice, regardless of the question whether or not such officer was personally engaged in the business of the corporation.¹⁵ If the person on whom service of process is made is not an officer, service upon him will be valid provided his position is such that, in the usual course of business, he is under a duty to call such notice to the attention of the corporation.¹⁶ So, where an agent is transacting business of

⁹It is to be noted in this connection that the term "doing business" has acquired different meanings under other laws (*e. g.*, licensing laws). See *International Text Book Co. v. Tone* (1917) 220 N. Y. 313, 115 N. E. 914.

¹⁰See *St. Louis, S. W. Ry. v. Alexander*, *supra*, at p. 227; *cf.*, *La Bourgeois* [1899] P. 1.

¹¹See *St. Louis, S. W. Ry. v. Alexander*, *supra*; *International Harvester v. Kentucky*, *supra*; *Pomeroy v. Hocking Valley Ry.* (1916) 218 N. Y. 530, 113 N. E. 504. The mere solicitation of patronage has not been considered "doing business". *Green v. Chicago, etc. Ry.* (1907) 205 U. S. 530, 27 Sup. Ct. 595; *Goepfert v. Compagnie Generale Transatlantique* (C. C. 1907) 156 Fed. 196.

¹²*Houston v. Filer & Stowell Co.* (C. C. 1898) 85 Fed. 757; *New Haven, etc. Co. v. Downingtown Mfg. Co.* (C. C. 1904) 130 Fed. 605; *Premo Specialty Mfg. Co. v. Jersey-Creme Co.* (C. C. A. 1912) 200 Fed. 352.

¹³*Clews v. Woodstock Iron Co.*, *supra*; *Noel Construction Co. v. G. W. Smith & Co.* (C. C. 1911) 193 Fed. 492; see *Hoyt v. Ogden Portland Cement Co.* (C. C. 1911) 185 Fed. 889, 898 *et seq.*

¹⁴*Lumbermen's Ins. Co. v. Meyer* (1905) 197 U. S. 407, 25 Sup. Ct. 483.

¹⁵*Lumbermen's Ins. Co. v. Meyer*, *supra*. The fact that service on a general officer within the state is void if the corporation is not "doing business" within the state is not because of any lack of notice but simply because of lack of jurisdiction. *Riverside Mills v. Menefee*, *supra*; see cases in footnote 11, *supra*.

¹⁶*Carroll v. New York, etc. R. R.* (1900) 65 N. J. L. 124, 46 Atl. 708; *Conn. Mut. Life Ins. Co. v. Spratley* (1899) 172 U. S. 602, 19 Sup. Ct. 308; see *St. Clair v. Cox*, *supra*.

such a nature that the corporation may be said to be doing business through him, that is, where he is a representative of the corporation rather than a mere employee, process may be served on him.¹⁷

Where a state statute requires that a corporation "doing business" within the state designate an agent upon whom service may be made, and further provides who may be served in default of such appointment, an agent thus designated may be served regardless of whether the cause of action arose within or without the local forum.¹⁸ Where, however, no person has been actually designated, a different rule prevails. Even though the state has no power to hold service on a person not a true agent to be notice to the corporation,¹⁹ yet, if the action has arisen out of a transaction within the state, the corporation will be estopped to deny the validity of the service, since it has done business in defiance of the state laws.²⁰ But where the cause of action arises without the state, there is no basis for such an estoppel, for the corporation was not, as to the particular transaction, acting in defiance of the laws of the state; and, therefore, in this class of cases, service upon the persons provided for in default of appointment by the statute is invalid.²¹

The case of *Tauza v. Susquehanna Coal Co.* (1917) 220 N. Y. 259, 115 N. E. 915, involved the application of these principles to §§ 432, 1780 of the New York Code of Civil Procedure. The plaintiff, a resident of New York, brought suit against the defendant, a Pennsylvania corporation maintaining in New York a sales office in charge of a resident sales agent who had under his supervision eight salesmen and a considerable clerical force. From this office, orders were solicited in the state, subject to confirmation by the main office in Philadelphia.

¹⁷*Norton v. Berlin Iron Bridge Co.* (1889) 51 N. J. L. 442, 17 Atl. 1079; *Riverside Mills v. Menefee*, *supra*. A "managing agent" under § 432, subd. 3 of the New York Code of Civil Procedure would seem to be such a representative. *Barrett v. American Tel. & Tel. Co.* (1893) 138 N. Y. 491, 34 N. E. 289.

¹⁸*Penna. Fire Ins. Co. v. Gold Issue Mining Co.* (1917) 243 U. S. 93, 37 Sup. Ct. 344; *Johnston v. Trade Ins. Co.* (1882) 132 Mass. 432; *Smolik v. Philadelphia, etc. Co.* (D. C. 1915) 222 Fed. 148; *Bagdon v. Philadelphia, etc. Co.* (1916) 217 N. Y. 432, 111 N. E. 1075; *cf.*, *Logan v. Bank of Scotland* [1904] 2 K. B. 495.

¹⁹*Carroll v. New York, etc. R. R.*, *supra*; see *Cella Commission Co. v. Bohlinger* (C. C. A. 1906) 147 Fed. 419.

²⁰*Ehrman v. Teutonia Ins. Co.* (D. C. 1880) 1 Fed. 471; *Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co.* (C. C. 1892) 55 Fed. 27; *Sparks v. National Masonic Acc. Ass'n.* (C. C. 1896) 73 Fed. 277; *cf.*, *Bankers' Surety Co. v. Town of Holly* (C. C. A. 1915) 219 Fed. 96.

²¹*Old Wayne Life Ass'n v. McDonough*, *supra*; *Simon v. Southern Ry.*, *supra*. The doctrine of these cases would not seem applicable to cases where true agents were served, since, if the corporation is doing business in the state rightfully or wrongfully, its agents and general officers in fact represent it. See *Rishmiller v. Denver, etc. R. R.* (1916) 134 Minn. 261, 159 N. W. 272; but *cf.*, *Takacs v. Philadelphia, etc. Ry.* (D. C. 1915) 228 Fed. 728, where, although the person served in default of appointment by the corporation was a director, the court vacated the service because the cause of action arose outside of the state. The question is thus raised whether under the New York Code of Civil Procedure § 432 (3) it is essential in actions *in personam* that the cause of action arise within the state. It is submitted that, all the persons there mentioned being true agents, there is no such constitutional requirement. See 17 Columbia Law Rev. 65.

In response to these orders goods were shipped from Pennsylvania to various points in New York. The court held, (1) that the defendant was "doing business" within the state so as to be amenable to its jurisdiction, (2) that the sales agent was a person on whom service could properly be made. The case in effect overruled a number of earlier erroneous decisions,²² and laid down a rule in harmony with the decisions of the federal courts:—if the plaintiff is given the right to sue under § 1780, he must, in all cases, establish that the foreign corporation is "doing business" within the state;²³ and, subject to the limitations contained in § 432, he may serve the person conducting such business.²⁴

FUGITIVES FROM JUSTICE UNDER THE FEDERAL RENDITION CLAUSE.—The Constitution provides for the rendition of fugitives,¹ and congressional legislation enacted to aid in the carrying out of this provision requires that, in a proper case, fugitives be given up on demand made upon the governor of the asylum state.² In order to make out a proper case for extradition, it is essential that it be shown, *first*, that the person whose extradition is sought is substantially charged with a crime,³ and, *second*, that he is a fugitive from justice.⁴

Just what will constitute a person a fugitive from justice is a question which has been repeatedly before both the federal and state courts. In order not to impair the efficacy of the constitutional provision, the phrase "person who shall flee from justice" has, in almost all cases, received an extremely liberal interpretation.⁵ Thus, in order for a person to become a fugitive from justice, it is not necessary that his

²²*Inter alia*, *Pope v. Terre Haute Car Mfg. Co.*, *supra*; *Sadler v. Boston & Bolivia Rubber Co.*, *supra*; *dicta* in *Grant v. Cananea Con. Copper Co.* (1907) 189 N. Y. 241, 82 N. E. 191.

²³The decision has the effect of abolishing any distinction between the respective rights of residents and non-residents to sue a foreign corporation; for, despite the provisions of § 1780, a resident plaintiff must show that the corporation is "doing business" in the state, while under § 1780 (4) this fact is a ground for suit by non-residents in the New York courts.

²⁴Since all the persons mentioned in § 432 as persons who may be served are true agents, the section presents no constitutional difficulties except those suggested in footnote 21, *supra*. Section 432 is purely procedural; the jurisdiction of the court must be drawn from other sections of the code. See *Dollar Co. v. Canadian C. & F. Co.* (1916) 220 N. Y. 270, 115 N. E. 711.

¹Art. IV, § 2. For the rendition of fugitives prior to the adoption of the Constitution, see 2 Moore, Extradition, §§ 517-519.

²U. S. Rev. Stat. §§ 5278, 5279. It is to be noted that, if the governor refuses to surrender the fugitive, *mandamus* will not lie to compel him to do so. *Commonwealth v. Dennison* (1861) 65 U. S. 66.

³*Ex parte Reggel* (1885) 114 U. S. 642, 5 Sup. Ct. 1148; see 14 Columbia Law Rev. 665. The crime must be charged by indictment or affidavit. U. S. Rev. Stat. § 5278. As to the value of an information, see 17 Columbia Law Rev. 248.

⁴*Roberts v. Reilly* (1885) 116 U. S. 80, 6 Sup. Ct. 291. The findings of the governor of the asylum state may be reviewed on *habeas corpus*, *Ex parte Reggel*, *supra*; see 14 Columbia Law Rev. 665, by both the state and federal courts. *Robb v. Connolly* (1884) 111 U. S. 624, 4 Sup. Ct. 544.

⁵*Appleyard v. Massachusetts* (1906) 203 U. S. 222, 27 Sup. Ct. 122.

departure from the jurisdiction in which he is accused of crime be subsequent to the commencing of proceedings to secure his punishment.⁶ Moreover, proof of conscious flight is not required,⁷ for the motives inducing departure are immaterial.⁸ He may be a fugitive although he leaves the state after one indictment against him for the crime has been dismissed,⁹ or even if he is ignorant of the fact that he has committed any crime.¹⁰ He becomes a fugitive if he departs from the jurisdiction after the time when the crime was committed,¹¹ and before he has made satisfaction for it.¹²

In one class of cases, however, the Supreme Court has refused to permit the surrender of persons demanded by a state as criminals: when, at the time the crime was committed, the person sought was merely constructively present in the demanding state, he will not be delivered up as a fugitive from justice.¹³ And this is in accord with the established practice of the state courts.¹⁴ This seeming exception is subject to the limitation that, if the person demanded was actually present in the demanding jurisdiction when some act which was intended to be and was a material step toward accomplishing the crime was performed, then he will be returned even though he may not have remained in that state while every act necessary to the completion of the offense was being done.¹⁵ In so far as the rule relates to cases where the demanded person has not been within the confines of the demanding state since the time of the commission of the crime charged, it can be supported on the ground that it is a fair construction of the constitutional provision; for a person cannot flee from a state in which he has not been.¹⁶ But, when it is shown that the alleged fugitive has subsequently been within the demanding state, and has departed therefrom, it seems that he should be surrendered. Such, however, is not the view generally taken. A subsequent entry into and departure from a demanding state does not render a person liable to

⁶Roberts v. Reilly, *supra*.

⁷Appleyard v. Massachusetts, *supra*.

⁸Drew v. Thaw (1914) 235 U. S. 432, 35 Sup. Ct. 137; *Ex parte* Galbreath (1913) 24 N. D. 582, 139 N. W. 1050; *contra*, *In re* Tod (1900) 12 S. D. 386, 81 N. W. 637.

⁹Bassing v. Cady (1908) 208 U. S. 386, 28 Sup. Ct. 392.

¹⁰Appleyard v. Massachusetts, *supra*; Johnson and Johnson v. Ammons (1879) 6 Ohio Dec. Reprint 747.

¹¹Appleyard v. Massachusetts, *supra*.

¹²Hughes v. Pflanz (C. C. A. 1905) 138 Fed. 980; Drinkall v. Spiegel (1896) 68 Conn. 441, 36 Atl. 830. A person who leaves the state while on parole becomes a fugitive if the parole is thereafter revoked. *Ex parte* Williams (1913) 10 Okla. Cr. 344, 136 Pac. 597.

¹³Hyatt v. Corkran (1903) 188 U. S. 691, 23 Sup. Ct. 456.

¹⁴People *ex rel.* Corkran v. Hyatt (*aff'd.*, *sub nomine* Hyatt v. Corkran, *supra*) (1902) 172 N. Y. 176, 64 N. E. 825; *Ex parte* Shoemaker (1914) 25 Cal. App. 551, 144 Pac. 985; State v. Hall (1894) 115 N. C. 811, 20 S. E. 729.

¹⁵Strassheim v. Daily (1911) 221 U. S. 280, 31 Sup. Ct. 558; State *ex rel.* Rinne v. Gerber (1910) 111 Minn. 132, 126 N. W. 482; *In re* Sultan (1894) 115 N. C. 57, 20 S. E. 375.

¹⁶Hyatt v. Corkran, *supra*; *In re* Mohr (1883) 73 Ala. 503; Jones v. Leonard (1878) 50 Iowa 106.

extradition; he must have been within the demanding jurisdiction when some act which constituted a step toward the completion of the crime was performed.¹⁷

Two recent cases involving the determination of who are fugitives from justice are of considerable interest. In *Biddinger v. Commissioner of Police of City of New York* (1917) 38 Sup. Ct. 41, the Supreme Court settled a question in regard to which the lower federal courts had been in conflict,¹⁸ for it was there held that the relator was a fugitive despite the fact that he had not departed from the demanding state until prosecution for the crime charged had been barred by the statute of limitations of that jurisdiction.¹⁹ This commendable decision is in accord with the tendency of the courts to refuse to give a literalistic interpretation to the constitutional provision,²⁰ and to construe it so as to render it most effective for the administration of the criminal laws of the states.²¹ It is in marked contrast, moreover, to the holding in *In re Whittington* (Cal. App. 1917) 167 Pac. 404. There the petitioner had been taken in custody in Texas on a charge of larceny alleged to have been committed in that state. Before his trial, California sought his extradition on a charge of murder. He was thereupon surrendered by the governor of Texas and taken to California. Subsequently, the charge in California having been disposed of, Texas sought his return to answer to the charge of larceny. After he had been surrendered to the agent of Texas, he obtained a writ of *habeas corpus*, and, on the hearing on the return to the writ, was released. Two grounds were assigned for the decision. One was that, by surrendering the petitioner, Texas had waived its jurisdiction over him. It was not shown, however, that the governor of Texas had authority to waive the jurisdiction of his state. As a matter of fact the Texas courts have held to the contrary.²² The other ground was

¹⁷People *ex rel.* Corkran *v.* Hyatt, *supra*, at p. 187; *Ex parte* Shoemaker, *supra*; but see *Ex parte* Knowles (1895) 17 Ky. Law Rep. 588.

¹⁸See Reed *v.* United States (C. C. A. 1915) 224 Fed. 378 and Bruce *v.* Rayner (C. C. A. 1903) 124 Fed. 481, for examples of the divergent views of the lower federal courts.

¹⁹The Court also rejected evidence offered to prove that the relator, because of the running of the statute of limitations, could not be convicted in the demanding state. This is obviously sound for, since an alleged fugitive need merely be substantially charged with a crime, *supra*, footnote 3, he cannot resist extradition on the ground that he could not be convicted in the demanding state. Drew *v.* Thaw, *supra*; *In re* White (C. C. A. 1893) 55 Fed. 54.

²⁰See particularly cases cited in footnotes 5, 6 and 8, *supra*.

²¹Appleyard *v.* Massachusetts, *supra*. This is borne out by Innis *v.* Tobin (1916) 240 U. S. 127, 36 Sup. Ct. 290, where the Court said that a state could surrender to another state fugitives whose rendition was within the terms of the constitutional provision, whether or not Congress had provided for such surrender, and indicated that this was necessary in order to prevent states from becoming asylums for fugitives from justice.

²²*Ex parte* Hobbs (1893) 32 Tex. Cr. App. 312, 22 S. W. 1035; *Ex parte* McDaniel (1915) 76 Tex. Cr. App. 184, 173 S. W. 1018. As to the views of other states on this question, compare Opinion of Justices (1909) 201 Mass. 609, 89 N. E. 174 with *In re* Hess (1897) 5 Kan. App. 763, 48 Pac. 596. See also Patterson's Case (Dist. of Col. 1877) reported in 2 Moore, Extradition, § 569.

that, since the petitioner had been taken out of the state against his will and under compulsory process, he could not be said to have fled therefrom.²³ While this may be in accord with the letter of the law, it is opposed to its spirit, and to the spirit of its previous interpretation.²⁴

RIGHT OF TORT CREDITOR OF TRUSTEE TO BE INDEMNIFIED OUT OF TRUST ESTATE.—When the purchase price of property is paid by one person, and title taken in the name of another, a resulting trust in favor of the person furnishing the consideration is presumed whether or not there is a parol or written agreement to the effect that the property should be held in trust.¹ This well recognized exception to the Statute of Frauds is effective to compel a conveyance to the party furnishing the purchase money,² unless it is a fraud to do so.³ Statutes in many jurisdictions have, by one method or another, practically abolished this form of resulting trust.⁴ The real effect of these statutes is to negative any implication of an agreement to hold in trust, which might arise from the mere fact that the legal title has been taken by a person other than the one furnishing the purchase money. They do not, however, prevent the plaintiff from setting up an actual agreement; but if he does so, he may be met with the defense that the agreement is within the Statute of Frauds, and may, therefore, be required to show sufficient equitable grounds for enforcing the trust despite the Statute.⁵

When the parties carry out the trust, it seems reasonable that their rights and liabilities should be the same as though properly declared in an express trust. So that, when a creditor of the trustee seeks to recover on a contract made by the trustee in the administration of the estate, his primary right is against the trustee personally.⁶ Payments made in the due administration of the estate constitute a proper charge against the estate, and the trustee has a right of reimbursement to the extent of

²³But *cf.*, *State v. Richter* (1887) 37 Minn. 436, 35 N. W. 9, holding that a person who left the demanding state to answer a charge in the asylum state in accordance with the conditions of a recognizance previously there entered into, was a fugitive.

²⁴In a similar case, a few months earlier, the Supreme Court of Georgia allowed extradition. *Hart v. Mangum* (1917) 146 Ga. 497, 91 S. E. 543.

¹*Galbraith v. Galbraith* (1899) 190 Pa. 225, 42 Atl. 683; see *Story*, Eq. Jur. (13th ed.) § 1201; *cf.*, *Smithsonian Institution v. Meech* (1898) 169 U. S. 398, 42 Sup. Ct. 793.

²*Galbraith v. Galbraith*, *supra*.

³*Keely v. Gregg* (1905) 33 Mont. 216, 82 Pac. 27; *Derry v. Fielder* (1909) 216 Mo. 176, 115 S. W. 412.

⁴*Burns' Ann. Ind. Stat.*, Rev. 1914, §§ 4017, 4018; *Gen. Stat. Kan.* 1915, §§ 11679, 11680; *Carroll's Ky. Stat.* 1915, §§ 2353, 2354; *Real Property Law* (N. Y. Consol. Laws, c. 50) § 94.

⁵The doctrine of part performance of contracts to sell real property has been loosely applied to the class of cases under discussion. *Cf.*, *McKinley v. Hessen* (1911) 202 N. Y. 24, 95 N. E. 32. In general, the existence of confidential relationship, a partial performance of the agreement, or an acknowledgment of the trust by the trustee are factors which may induce the courts to enforce the agreement. *Holliday v. Perry* (1906) 38 Ind. App. 588; *Gage v. Gage* (1894) 83 Hun 362, 31 N. Y. Supp. 903; *Jeremiah v. Pitcher* (1898) 26 App. Div. 402, 49 N. Y. Supp. 788; *McKinley v. Hessen*, *supra*.

⁶*Dantzler v. McInnis* (1907) 151 Ala. 293, 44 So. 193.

his right of exoneration.⁷ To this extent, the creditor, having exhausted his legal remedies against the trustee, is given a derivative right against the trust fund.⁸ Although some jurisdictions declare that the trust fund must have been unjustly enriched,⁹ this fact is, by the better authority, deemed immaterial.¹⁰ To a limited degree, this right might be exercised in favor of a tort creditor, as has been done where a trustee has used due care in the selection of an agent, and the agent has, in the course of his employment, committed a tort for which the law holds the trustee liable.¹¹

But, if the creditor is to be limited in his recovery to his debtor's right of exoneration, it is obvious that in many instances he will be practically remediless. Thus, where the trustee is in default, or where, as in the recent case of *Heystad v. Wysiecki* (N. Y. 1917) 177 App. Div. 733, the claim arises out of the trustee's tortious mismanagement of the trust property, no recovery on this theory could be permitted. The court in the *Heystad* case avoided the determination of this question by deciding that, under the New York statute,¹² there could be no trust in favor of the person furnishing the purchase money, even though there was an understanding between the buyer and the grantee, that the latter was to hold for the former and to pay him a fixed income from the property until he should desire it to be conveyed to him, and even though the grantee afterwards did convey.¹³ The court declared, however, that, although the grantee was under a moral obligation to convey, yet the creditor, having been injured by the mismanagement of the property, acquired a right in equity to subject it to his claim, which was superior to the defendant's right to receive a conveyance. The conveyance was, therefore, set aside as fraudulent.

The interesting question raised in this case is, whether the creditor could have recovered against the property, had the court found that the transaction created a valid trust. The doctrine of a derivative right based on the trustee's right of exoneration is obviously inapplicable, since the trustee cannot claim reimbursement for his own personal wrong.¹⁴ Nor can the *cestui* be held as an undisclosed principal, since it is well settled that the trustee is not the agent of the *cestui*.¹⁵ Although this is so, the trustee is in a certain non-technical sense the agent and representative of the fund which he administers.¹⁶ If a trustee, having trust money in a bank account, drew a check in pay-

⁷See *Dowse v. Gorton* [1891] A. C. 190; *In re Johnson* (1880) 15 Ch. D. 548; *Lewin, Trusts* (12th ed.) 795.

⁸*Tennant v. Stoney* (S. C. 1845) 1 Rich. Eq. 222, 263; *Laible v. Ferry* (1880) 32 N. J. Eq. 791; *First Nat'l Bank of Freehold v. Thompson* (1901) 61 N. J. Eq. 188, 48 Atl. 333; *In re Johnson, supra*; *cf., In re British Power, etc. Co.* [1910] 2 Ch. 470.

⁹*Yerkes v. Richards* (1895) 170 Pa. 346, 32 Atl. 1089.

¹⁰*Mason v. Pomeroy* (1890) 151 Mass. 164, 24 N. E. 202.

¹¹*In re Raybould* [1900] 1 Ch. 199; see *Benett v. Wyndham* (1862) 4 De G. F. & J. *259.

¹²*Real Property Law* (N. Y. Consol. Laws, c. 50) § 94.

¹³On this point the decision is at variance with the earlier New York cases. *Smith v. Balcom* (1897) 24 App. Div. 437, 48 N. Y. Supp. 487; *Jeremiah v. Pitcher, supra*; *McKinley v. Hessen, supra*.

¹⁴See *Lewin, op. cit.*, 800.

¹⁵*Dantzler v. McInnis, supra*.

¹⁶See 28 *Harvard Law Rev.* 725, 740.

ment of a debt incurred in the administration of the trust, such payment could not be deemed to be a breach of trust, regardless of whether the trustee was in default or not. Hence, a creditor receiving such a check, even with knowledge that the trustee owed the beneficiary on account of a separate and independent breach of trust, ought not to be required to refund the proceeds as money received by him from a trustee who had paid out in breach of trust. If, therefore, the trustee possesses such a power to pay the expenses of administration out of the trust funds, a judgment creditor should be entitled to have the benefit of the power. This reasoning would be equally applicable to tort creditors, whether the tort was committed by the agent of the trustee, or by the trustee himself. The practical result of such a doctrine would be that the burden of all expenses incidental to the administration of a trust would fall upon the trust fund itself, a solution which seems more just than that reached where a court measures the rights of a creditor against trust funds by the trustee's right of exoneration.¹⁷

Furthermore, if the right of the *cestui* against the trust fund is a right *in personam* against the trustee, and not a right *in rem*, or equitable property right,¹⁸ it would seem feasible for equity to restrict this right in favor of those who have in good faith acquired countervailing equities due to the mismanagement of the trust property. Any judgment creditor of the trustee has, at common law, a right to seize the trust property on execution, and equity restrains him from so doing solely on the theory that he is interfering with the equitable rights of the *cestui*.¹⁹ But a creditor who bases his claim on the official misconduct of the trustee ought to occupy a better position than a creditor who seeks recovery against the trustee on a liability not incurred in the management of the trust property. Although the court, in *Heystad v. Wysiecki*, declared that the right of the beneficiary was not that of a *cestui que trust*, nevertheless, it was a right superior to that of an ordinary creditor, but inferior to that of the plaintiff. A court of equity might, therefore, apply a similar doctrine in the case of express trusts. In this aspect, the question is really one of balancing conflicting equities, and considerations of practical justice seem to demand that the trust fund be made to bear the losses which its creation has made possible.

CONTRIBUTION BETWEEN SURETIES BEFORE JUDGMENT.—The right of contribution between sureties is that right which a surety has, to be reimbursed for a *pro rata* share of any amount which he has paid out on a debt for which he and his co-sureties were severally, or jointly and severally, liable. This right existed by the custom of the City of London¹ although at an early date the law courts refused to recognize it.² Soon after this action of the law courts, however, a bill for con-

¹⁷The courts of Georgia and Pennsylvania have shown a tendency to repudiate the doctrine that the right of the creditor against the trust fund depends upon the trustee's right of exoneration and to base his recovery on principles analogous to those suggested in the text. *Wylly v. Collins* (1851) 9 Ga. 223; *Prinz v. Lucas* (1905) 210 Pa. 620, 60 Atl. 309; see 15 American Law Rev. 449; 59 University of Pennsylvania Law Rev. 250.

¹⁸See 17 Columbia Law Rev. 467.

¹⁹See Lewin, *op. cit.*, 250, 275, note b.

¹Layer v. Nelson (1687) 1 Vern. 456.

²Wormleighton v. Hunter (1614) Godb. 243.

tribution between sureties was allowed in equity, based, not on a contract express or implied, but simply on the equitable principle that where two or more persons are primarily subject to the same obligation and one of them pays, the others should contribute their shares.³ But in the early part of the 19th century the law courts, taking cognizance of the action for contribution between sureties, allowed *indebitatus assumpsit*.⁴ In the adoption by the law court of this equitable remedy, however, the restricted formulae of the common law affected both the theory of the action⁵ and the measure of relief.⁶ Accordingly, although in equity, in a case where some of the sureties are insolvent or out of the jurisdiction, the amount paid is apportioned between those solvent sureties who can be brought before the court,⁷ at law each co-surety is liable only for a share of the sum paid, divided by the number of sureties originally existing, regardless of their ability to pay.⁸ Furthermore, it has been held that a suit may be maintained at law without an allega-

³*Fleetwood v. Charnock* (1629) Nels. Ch. R. 10. "contribution is bottomed and fixed on general principles of justice, and does not spring from contract; although the contract may qualify it". *Dering v. Earl of Winchelsea* (1787) 1 Cox Eq. Cas. 318, at p. 320. "after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of contracts, implied from the universality of that principle." *Craythorne v. Swinburn* (1807) 14 Ves. Jr. 159, at p. 169.

⁴*Davies v. Humphreys* (1840) 6 M. & W. 152; see *Turner v. Davies* (1796) 2 Esp. 479; *Cowell v. Edwards* (1800) 2 Bos. & Pul. 269; *cf.*, *Carlington v. Carson* (N. C. 1801) Conf. Rep. 216, where an action at law was denied.

⁵The form of action allowed was for money paid to the use of another. See cases in footnote 4, *supra*.

⁶"Courts of law, however, although they borrowed their jurisdiction in regard to contribution from courts of equity, and enforced their newly acquired jurisdiction in accordance with common law forms of action, still felt themselves so hampered in the exercise of their newly found powers, that they refused to allow a surety who had paid a debt to recover from his co-surety more than his aliquot or proportional part of the payment thus made". *Van Petten v. Richardson* (1878) 68 Mo. 379, at p. 381.

⁷*Peter v. Rich* (1629) 1 Rep. in Chan. 34; *Stewart v. Goulden* (1883) 52 Mich. 143, 17 N. W. 731; see *Trego v. Estate of Cunningham* (1915) 267 Ill. 367, 108 N. E. 350.

⁸*Cowell v. Edwards*, *supra*; *Powell v. Matthis* (1843) 26 N. C. 83; see *Fischer v. Gaither* (1898) 32 Ore. 161, 51 Pac. 376. "There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity when they are parties to the action." *Easterly v. Barber* (1876) 66 N. Y. 433, at p. 440. "There is something very nearly bordering on absurdity in saying to a joint contractor, who has removed the common burden, that he may have his remedy either in a court of equity, or a court of law, but that, if he sues in chancery, he may recover his whole claim, whereas, if he brings his suit at law, he shall recover only a part. The action for money paid is an equitable action; and when a plaintiff has paid money for the benefit of the defendant, he ought not to be driven out of a court of law." *Mills v. Hyde* (1846) 19 Vt. 59, at p. 65.

tion that the principal debtor is insolvent.⁹ The better view, however, would seem to be that both at law and in equity, the plaintiff must show the inability of the principal debtor to satisfy the debt.¹⁰ In spite of the assumption by the law courts of jurisdiction over an action for contribution, it has nevertheless been held that equity is not ousted of its jurisdiction;¹¹ and this would seem especially true where the common-law action fails to give adequate relief.¹²

Since the rights of a surety against his co-sureties rest upon a relational basis, the right to contribution exists even though the surety had no knowledge that there was another surety.¹³ Moreover, a release by the creditor to one surety should not absolve him from liability to his co-obligors,¹⁴ and similarly, if the principal debtor has given one surety security for the payment of the debt, such security must be applied for the benefit of all.¹⁵ However, it is essential that the parties shall have become sureties for the same obligation, no right to contribution existing where the obligations are distinct,¹⁶ or where a subsequent surety binds himself to pay the debt, only in case both the principal debtor and his sureties fail to satisfy it.¹⁷ But the parties may by contract vary, as between themselves, the equality of the obligation.¹⁸ Furthermore, if a surety settles a debt for an amount less than its face value, he is entitled only to the proportional amount of that sum for which the obligation has actually been settled,¹⁹ whereas if he pays where no liability existed, he can recover nothing from his fellow surety.²⁰

It is often said that a surety cannot call upon his co-surety to contribute until he has paid more than his proportion of the obligation for

⁹*Sloo v. Pool* (1853) 15 Ill. 47; see *Smith v. Mason* (1895) 44 Neb. 610, 63 N. W. 41; *Cowell v. Edwards*, *supra*.

¹⁰*McCormack's Adm'r. v. Obannon's Ex'rs.* (1811) 17 Va. 484; *Morrison v. Poyntz* (1838) 37 Ky. 307; *Fischer v. Gaither*, *supra*; *Croy v. Clark* (1881) 74 Ind. 597. "As the right to contribution is grounded upon the same reasons, both at law and in equity, it seems that the rule should be the same in both jurisdictions." Brant, *Surety & Guaranty* (3rd ed.) § 316. See *Adams v. Hayes* (1897) 120 N. C. 383, 27 S. E. 47.

¹¹*Couch v. Terry's Adm'r.* (1847) 12 Ala. 225; *Crowder v. Denny* (1859) 40 Tenn. 359; *Comstock v. Potter* (Iowa 1916) 158 N. W. 102.

¹²See footnote 7, *supra*.

¹³*Warner v. Morrison* (1862) 85 Mass. 566.

¹⁴*Clapp v. Rice* (1860) 81 Mass. 557; see *Boardman v. Paige* (1840) 11 N. H. 431; *Ward v. National Bank* (1883) 8 App. Cas. 755. See footnote 20, *infra*.

¹⁵*Steele v. Dixon* (1881) 17 Ch. D. 825; *In re Arcedeckne* (1883) 24 Ch. D. 709; *contra*, *Moore v. Moore* (1826) 11 N. C. 358. And where a surety surrenders the security, the co-sureties are discharged as against him. *Milner v. Eskridge* (Colo. 1917) 163 Pac. 1115.

¹⁶*Rosenbaum v. Goodman* (1883) 78 Va. 121.

¹⁷*Craythorne v. Swinburn*, *supra*; *Bulkeley v. House* (1893) 62 Conn. 459, 26 Atl. 352; *Golsen v. Brand* (1874) 75 Ill. 148; *cf.*, *Cooke v. —*, (1886) 2 Freem. Ch. 97, which is mentioned in *Craythorne v. Swinburn*, *supra*, but is not followed.

¹⁸*Paul v. Berry* (1875) 78 Ill. 158.

¹⁹*Stallworth v. Preslar* (1859) 34 Ala. 505.

²⁰*Cocke v. Hoffman* (1880) 73 Tenn. 105. Yet, if a surety is ignorant of a defense he is not barred from recovery. *Warner v. Morrison*, *supra*; *Hichborn v. Fletcher* (1877) 66 Me. 209. If the co-surety knows of a defense to the original action and does not ask the surety sued to interpose it, he should not later in the action against him for contribution be heard to say that the plaintiff was a volunteer. See *Skrainka v. Rohan* (1885) 18 Mo. App. 340.

which they are bound.²¹ As a statement of a rule of law this seems unquestionable, for, until payment has been made, there is no basis for an action for money paid to the use of another. In equity, however, although the rule is commonly stated in the same form,²² its accuracy seems doubtful. It is manifestly just that if a surety pays only his proportion of the debt and the residue is not released, he should not call upon his co-surety who may later be obliged by the creditor to satisfy the balance of the obligation;²³ but where the surety is sued for the full amount of the debt and there is no defense, it would seem that he should be permitted to bring a bill in equity for exoneration and that the chancery court should order the co-sureties to aid in payment.²⁴ This question is raised by the recent case of *Reeder v. Union Trust Co.* (1917) 26 Pa. Dist. R. 833. There the plaintiff's testator and four others were directors of a corporation. A note was made by the corporation and indorsed by all five directors, it being shown that the parties as between themselves were to be co-sureties with equal liability. The corporation becoming insolvent, the holders sued the plaintiff as executrix of one of the sureties. While the suit at law was pending, the executrix brought a bill in equity against the co-sureties for contribution and joined the creditor. The court held that, even though the plaintiff had paid nothing on the note and had not even been sued to judgment, she could maintain her bill, and accordingly decreed that all the solvent sureties join with her in payment.

As some of the earlier cases in equity allowed contribution after judgment but before satisfaction,²⁵ it would seem that the effect of the judgment is only to ascertain the amount of the obligation.²⁶ Hence, if the amount due is already known and there is no defense, there would seem to be no difficulty in allowing a bill in equity for contribution before judgment, especially where, because of the insolvency of one of the co-sureties, there is no adequate remedy at law. However, the decree should be so framed that the creditor will not be deprived of his rights or delayed in their enforcement.²⁷ It is submitted, therefore, that although the case under discussion could be supported upon the narrow ground that an admitted claim against an estate is equivalent to judgment,²⁸ or that equity in order to facilitate the administration of an estate will grant extraordinary relief, the doctrine of these cases should be admitted in its entirety.

²¹*Davies v. Humphreys, supra*; *Washington, Adm'r. v. Norwood* (1900) 128 Ala. 383, 30 So. 405.

²²*Ex parte Gifford* (1802) 6 Ves. Jr. 805. "No right of contribution arises in favor of a co-surety who pays no more than his ratable share of the common burden." *Stearns, Suretyship* (2nd ed.) § 269. See *Brant, op. cit.*, § 279; *Rowlatt, Principal & Surety*, 231.

²³*In re Snowdon* (1881) 50 L. J. Ch. 540.

²⁴*Wolmershausen v. Gullick* [1893] 2 Ch. 514.

²⁵*Morgan v. Seymour* (1637) 1 Rep. in Chan. 120. Where the surety had paid more than his share and a judgment was taken against him for the balance of the debt, he was allowed his bill for contribution before satisfaction. *Hyde v. Tracy* (Conn. 1807) 2 Day 491.

²⁶*In re Snowdon, supra*. If a surety pays the debt after judgment but before execution is issued, he can call upon his co-sureties to contribute, *Bradley v. Burwell* (N. Y. 1846) 3 Denio 61, and if the debt is due and there is no defense to be offered, payment before action is brought does not bar a surety's right to contribution. *Bright v. Lennon* (1880) 83 N. C. 183; see *Skrainka v. Rohan, supra*.

²⁷*Cf., Wolmershausen v. Gullick, supra*.

²⁸See *Rowlatt, op. cit.*, 233.

RECENT DECISIONS.

DOUGLAS M. BLACK, *Editor-in-Charge.*

APPEAL AND ERROR—"LAW OF THE CASE"—CONCLUSIVE UPON SECOND APPEAL.—The highest court of the state, upon a second appeal, reversed its holding as to the law declared by it to govern the case on the former appeal, upon the ground that the first decision was manifestly wrong. *Held*, two judges dissenting, there was no error. *Brewer v. Browning* (Miss. 1917) 76 So. 519.

It is generally stated that the law of a case as declared upon the first appeal to the highest court of the jurisdiction is conclusive upon the second appeal of the case to the same court upon the same question, *City Council of Montgomery v. Gilmer* (1858) 33 Ala. 116; *Reclamation Dist. No. 3 v. Goldman* (1884) 65 Cal. 635, 4 Pac. 676; *Guarantee Co. of North America v. Phoenix Ins. Co.* (1903) 124 Fed. 170, even if the court is satisfied that its first decision was erroneous. *Davidson v. Dallas* (1860) 15 Cal. 75; *Adams County v. B. & M. R. R.* (1880) 55 Iowa 94, 7 N. W. 471; *Pittsburg, etc., R. R. v. Hixon* (1886) 110 Ind. 225, 11 N. E. 285. The correctness of the first opinion can only be reviewed by a petition for a rehearing, see *McDonald v. McKinnon* (1895) 104 Mich. 428, 62 N. W. 560, which in some jurisdictions will not be entertained after a second jury trial of the same case. *Amoskeag Mfg. Co. v. Hlead* (1879) 59 N. H. 332. The reasons, when any are given, for the general rule are that to hold otherwise would lengthen litigation: *Teological Seminary v. People* (1901) 189 Ill. 439, 59 N. E. 977; or that an appellate court, in the absence of any special statutory or constitutional provisions, has no appellate jurisdiction over its own judgments and that once a judgment is made it becomes final and unappealable; *Leese v. Clark* (1862) 20 Cal. 388; or that the party in whose favor the decision on first appeal is granted gains a vested right in that decision. See *Taliaferro v. Barnett* (1886) 47 Ark. 359, 1 S. W. 702. In answer to the first reason for the rule, it is elementary that the primary purpose of courts is to administer justice, not to end litigation; and when those two aims conflict, the former should stand paramount. The second reason for the rule holds in those cases where the appellate court affirms the judgment of the lower court as in *State v. Wisconsin C. R. R.* (1907) 133 Wis. 478, 113 N. W. 952. There can be no review in such cases since there has been a final adjudication. But it would seem that, where the case has been reversed and remanded for a new trial, there has not been a final adjudication of anything, except that the case should be retried. *City of Hastings v. Foxworthy* (1895) 45 Neb. 676, 697, 63 N. W. 955. The judgment of the lower court is still subject to approval or reversal, and the appellate court can and should correct a manifest error made in the opinion on the first appeal, in order to prevent the perpetration of injustice against either of the parties to the suit, *City of Hastings v. Foxworthy, supra*; *Henry v. Atchison, etc., Ry.* (1910) 83 Kan. 104, 109 Pac. 1005. With regard to the third reason for the rule, it would seem that where the judgment has been affirmed on appeal, the doctrine of *res adjudicata* applies; but where the judgment of the lower court is reversed, there is nothing in which to have a vested right. See Black, *Judgments* (2nd ed.) § 511. Hence it would seem that the conclusion reached in the principal case is commendable.

ATTORNEYS—SUSPENSION—WHAT CONSTITUTES CONTEMPT.—In a case where two partners had been suspended from practice "in all the courts of this state" for one year, information was filed showing that during the period of suspension the former attorneys had maintained their offices as usual, that no change had been made in the signs on the doors or windows, that stationery had been used with the names of the partners printed thereon as Attorneys at Law, that their names were found with the same designation in the telephone book and the directory, and that the defendants had engaged in minor forms of practice, none of which practice, however, was denied to a layman. *Held*, the acts constituted contempt of court. *State v. Marron*; *State v. Wood* (N. Mex. 1917) 167 Pac. 9.

The word "attorney" in its generally accepted meaning is used to designate an officer of the court, see *People v. Erbaugh* (1908) 42 Colo. 480, 94 Pac. 349; *Danforth v. Egan* (1909) 23 S. D. 43, 50, 119 N. W. 1021, "set apart by the law, to expound, to all persons who seek him, the law of the land, relating to high interests of property, liberty, and life". See *Planters' Bank v. Hornberger* (1867) 44 Tenn. 531, 571. It seems clear, therefore, that the use of the term should be restricted within narrow limits and should be used only in connection with the name of a person who is possessed of an existing valid license to practice law. The purpose of the requirement of a license is to guard the administration of justice and thus to protect the public from the acts of persons not qualified either educationally or morally to practice. For the same purpose and as a necessary complement to the issuing of the license is the court process of suspension or disbarment; see *In re Thatcher* (D. C. 1911) 190 Fed. 969, 976 *et seq.*; *Ex parte Wall* (1882) 107 U. S. 265, 288, 2 Sup. Ct. 569; *Matter of Boland* (N. Y. 1908) 127 App. Div. 746, 752, 111 N. Y. Supp. 932; the punishment of the attorney is merely incidental to the real object of the decree. In view of the fact that probably the greater part of law practice has no direct connection with the courts, see *In re Duncan* (1909) 83 S. C. 186, 65 S. E. 210, it would seem that to allow a disbarred or suspended attorney to continue to hold himself out as an "attorney at law" and to do business not involving court proceedings would not only defeat the purpose of the decree but would hold the court up to contempt and ridicule in the eyes of the profession and of the general public. The argument as applied in the instant case that an attorney after a decree of suspension or disbarment should be permitted to do those things which a layman may do is unsound. The layman, while acting within his rights, acts as a layman and not as an attorney. There is no misrepresentation. While in the cases involving suspended or disbarred attorneys who are found guilty of contempt there is a misrepresentation, an acting not as a layman but as an attorney. *State v. Richardson* (1910) 125 La. 644, 51 So. 673; *In re Lizotte* (1911) 32 R. I. 386, 79 Atl. 960. Where the layman attempts to act in the capacity of an attorney the courts likewise find him guilty of contempt. *In re Bailey* (1915) 50 Mont. 365, 146 Pac. 1101; *People v. Erbaugh*, *supra*. The decisions do not go to the extent of holding that a suspended attorney is guilty of contempt for doing as a layman what the latter is entitled in law to do. The decision in the principal case is supported not only by authority, *In re Duncan*, *supra*; *State v. Richardson*, *supra*; *In re Lizotte*, *supra*, but is in accord with reason and sound policy.

CHAMPERTY—ASSIGNMENT OF A CHOSE IN ACTION TO AN ATTORNEY.—In return for services rendered that he was willing to settle for \$5,000 in cash, an attorney took an assignment of a claim for treble damages arising from a violation of the Sherman Anti-Trust Act. At the time of the assignment, he estimated the claim to be worth \$75,000, and if trebled it would consequently net him \$225,000. *Held*, the transaction was champertous and, therefore, an action on the assignment could not be maintained. *Sampliner v. Motion Picture Patents Co.* (D. C., S. D. N. Y. 1917) 243 Fed. 277.

At common law two elements were essential in order to make an agreement champertous: first, an undertaking by one person to defray the expense in whole or in part of another's suit; and, second, an agreement on the part of the latter to partition with the former the proceeds, if any, of the litigation. 4 Bl. Comm. *135; see *Brush v. City of Carbondale* (1907) 229 Ill. 144, 82 N. E. 252. The facts in the principal case, therefore, would not constitute champerty at common law, since there was no agreement to divide the proceeds of the suit. But under modern law, the crime is stripped of its ancient technical strictness, and is now a rule of public policy. 17 Columbia Law Rev. 335. So, the buying of a chose in action by an attorney with intention to sue thereon has been held "champerty in its most odious form". *Slade v. Zeifuss* (1904) 77 Conn. 457, 59 Atl. 406. But if the assignment be in consideration of an antecedent debt or for services rendered, it is not champerty. *Ware's Adm'r. v. Russell* (1881) 70 Ala. 174; N. Y. Code of Civ. Proc. § 76. In the instant case, the assignment was in consideration of an antecedent debt arising from services rendered. Hence, neither under the common law nor the modern theory was champerty committed. But in view of the fact, that an attorney is an officer of the court, his transactions are scrutinized jealously, *Matter of Holland* (1906) 110 App. Div. 799, 97 N. Y. Supp. 202, and acts which are deemed to be professional misconduct on his part will not be countenanced. *In re A Solicitor* [1912] 1 K. B. 302; *Wernimont v. State ex rel. Little Rock Bar Ass'n.* (1911) 101 Ark. 210, 142 S. W. 194. What is termed champerty is often in reality professional misconduct, and this seems to be the basis of the instant case. It would be hard for the attorney to show that the acceptance of a claim, which, if successfully prosecuted would net over \$200,000 in payment for services valued at \$5,000, was not a gross speculation and an unethical trafficking in the lawsuit of another. If courts would enforce contracts of this nature, legal sanction would be obtained for questionable conduct by attorneys with regard to the claims of others and the door would be open to flagrant contravention of public policy.

CONSENT—CRIMINAL ASSAULT BY HUSBAND ON WIFE—VENEREAL DISEASE.—Defendant was indicted for an assault on his wife in infecting her with syphilis. The judge in charging the jury ruled that the wife never consented to the inoculation of a loathsome disease and that if the defendant infected her knowingly, they should find him guilty. *State v. Lankford* (Del. 1917) 102 Atl. 63.

Consent as a defence to an indictment for assault means an intelligent assent to the act as contemplated and perpetrated by the defendant. Thus consent to medical treatment does not mean consent to defilement, *Reg. v. Case* (1850) 4 Cox C. C. 220, or lewd fondling; *Rex v. Rosinski* (1824) 1 Mood. 19; *Bartell v. State* (1900) 106 Wis. 342, 82 N. W. 142; consent to eat food is not consent to eat poison or

drugs concealed in it; *Commonwealth v. Stratton* (1873) 114 Mass. 303; *State v. Monroe* (1897) 121 N. C. 677, 28 S. E. 547; *contra*, *Reg. v. Hanson* (1849) 2 C. & K. *912; consent to intercourse is not consent to unreasonably brutal treatment accompanying such intercourse; *Richie v. State* (1877) 58 Ind. 355; and finally, in cases like the principal case, consent to intercourse is not consent to intercourse imparting pathogenic germs. *Reg. v. Bennett* (1866) 4 F. & F. 1105; *Reg. v. Sinclair* (1867) 13 Cox C. C. 28; see, *State v. Marcks* (1897) 140 Mo. 656, 677, 41 S. W. 973, 43 S. W. 1095; *contra*, *Reg. v. Clarence* (1888) 22 Q. B. D. 23. In civil cases of this nature, consent is not of governing importance, for as between unmarried persons it is felt to be against good policy to permit a recovery by a plaintiff who exposes herself promiscuously, especially since she must have contemplated such a risk, *Hegarty v. Shine* (1878) L. R. 4 Ir. 288; see dissenting opinion, *Reg. v. Clarence*, *supra*, 54, and as between man and wife, no action is maintainable because of the unity arising out of the marriage relation. *Bandfield v. Bandfield* (1898) 117 Mich. 80, 75 N. W. 287; *Schultz v. Christopher* (1911) 65 Wash. 496, 118 Pac. 629. But in criminal cases there is no objection to an indictment of a husband for an assault on his wife, *State v. Pettie* (1879) 80 N. C. 367, and the wife may testify against him in such a case. *Bramlette v. State* (1886) 21 Tex. Cr. 611, 2 S. W. 765; *Goodwin v. State* (1902) 114 Wis. 318, 90 N. W. 170. Consent then becomes of vital importance. The marital relation contemplates only healthy intercourse, see dissenting opinion, *Reg. v. Clarence*, *supra*, 59, and so the result in the principal case is sound, not because the wife's implied consent was vitiated by the fraud, but because there never was any consent to be contaminated. It has even been said that the state, as a third party interested in all marriages, would object to a deliberate assent to intercourse with a diseased spouse. See, *Trammell v. Vaughan* (1900) 158 Mo. 214, 59 S. W. 79. The principal case seems to be the first of its kind since *Reg. v. Clarence*, *supra*, which is *contra*, but legal scholars have generally sided with the dissenting judges in that case. 2 Bishop, New Criminal Law 72 *b* (2); Beale, Consent in the Criminal Law, 8 Harvard Law Rev. 319.

CONTRACTS—PUBLIC POLICY—PERSONAL RIGHTS.—In consideration of monthly payments by the defendants, the plaintiff contracted to make no claim to his father's estate, and to leave and stay out of a specified county. Subsequently the plaintiff entered this county, and the defendants discontinued the monthly payments, for which the plaintiff sued, on the theory that the covenant to stay out of the county was counter to policy, and the promise to make no claim to his father's estate was sufficient to bind the defendants. *Held*, for the defendant, on the ground that the contract was inseparable and the promise to stay away was valid and unperformed. *Wallace v. McPherson* (Tenn. 1917) 197 S. W. 565.

A contract stipulating for an extreme and unreasonable abnegation of legal rights will not be recognized. See *Mittenthal v. Mascagni* (1903) 183 Mass. 19, 66 N. E. 425. Therefore, an individual cannot broadly contract away his right to hold property, *Baltimore Humane etc. Society v. Pierce* (1905) 100 Md. 520, 60 Atl. 277, to engage in business, *Ward v. Byrne* (1839) 5 M. & W. 547, to resort to the courts, *Fox v. Masons' etc. Ass'n* (1897) 96 Wis. 390, 71 N. W. 363, to be free from involuntary servitude, *Parsons v. Trask* (1856) 73 Mass. 473,

or to marry. *King v. King* (1900) 63 Ohio 363, 59 N. E. 111, *cf.* *Grace v. Webb* (1846) 15 Sim. 384. A contract unduly restraining one's personal liberty is void as against public policy. *In re Baker* (N. Y. 1865) 29 How. Prac. 485; but *cf.* *Commonwealth v. Schultz* (Pa. 1816) 3 Wheeler C. C. 322. But an individual may reasonably limit these rights, *Mittenthal v. Mascagni, supra*; *Crowder-Jones v. Sullivan* (1904) 9 Ont. L. R. 27, and so, a promise to stay out of a small district is legal. *Jamieson v. Renwick* (Australia 1891) 17 Vic. L. R. 124. The court, therefore, in the instant case was correct in concluding that the contract was legal; the question, however, need never have been raised in view of the plaintiff's non-performance. Furthermore, even granting the plaintiff's contention that the promise to stay away was illegal, there could have been no recovery; for where both legal and illegal promises are given for a valid and unapportionable consideration, there can be no recovery even though both promises have been performed. *Bishop v. Palmer* (1888) 146 Mass. 469, 16 N. E. 299; *cf.* *Cahill v. Gilman* (1914) 84 Misc. 372, 146 N. Y. Supp. 224.

DAMAGES—LOSS OF CHANCE TO COMPETE—PRIZE OR REWARD.—The physical condition of the plaintiff's hogs was affected by the defendant carrier's delay in transporting them to an exhibition, where, as the defendant knew, they were to be entered in competition. The hogs were awarded second premium and the plaintiff brought an action in contract, claiming as an element of his damage the failure to win first premium. *Held*, such damages were not too speculative. *Kansas City, M. & O. Ry. v. Bell* (Tex. Civ. App. 1917) 197 S. W. 322.

Although mere uncertainty as to the *quantum* of damages is no reason for denying a remedy, *Wakeman v. Wheeler* (1886) 101 N. Y. 205, 4 N. E. 264; *Simpson v. London etc. Ry.* (1876) 1 Q. B. D. 274; *contra*, *Louisville Bridge Co. v. Louisville Etc. R. R.* (1903) 116 Ky. 258, 75 S. W. 285, uncertainty as to whether there are actual damages will prevent recovery. *Sapwell v. Bass* [1910] 2 K. B. 486; see *Crichfield v. Julia* (C. C. A. 1906) 147 Fed. 65, 70. Hence it has been held that damages may not include compensation for prizes or rewards that might have been won on future unspecified occasions. *Cain v. Vollmer* (1910) 19 Idaho 163, 112 Pac. 886; *Mizner v. Frazier* (1879) 40 Mich. 592. But the authorities are not in accord as to whether the deprivation of a chance for a particular prize or reward should entitle the plaintiff to damages. On the ground that no amount of human ingenuity can foresee future contingencies, recovery has been refused, *Western Union Tel. Co. v. Crall* (1888) 39 Kan. 580, 18 Pac. 719; see *Smith v. Gentry* (1898) 20 Ky. 17, 45 S. W. 515; *cf.* *Ft. Worth etc. Ry. v. Ikard Co.* (Tex. 1911) 140 S. W. 502, but apparently on the theory that the uncertainty can be overcome by the introduction of evidence, a contrary result has been reached in cases where the prize or reward would probably have been won, *McPeck v. Western Union Tel. Co.* (1899) 107 Iowa 356, 78 N. W. 63; see *Watson v. Ambergate etc. Ry.* (Eng. 1850) 15 Jur. 448, or, what is the same thing, where the chance itself was considered of pecuniary value. *Chaplin v. Hicks* [1911] 2 K. B. 786; *Adams Express Co. v. Egbert* (1860) 36 Pa. 360. It would seem, therefore, that the principal case was correct in holding that evidence might be admitted from which the probability of the plaintiff winning the prize might be estimated.

DEEDS—REFORMATION OF VOLUNTARY INSTRUMENT—GRANTOR DECEASED.—A grantor conveyed a plantation to her two sons by two voluntary conveyances. The first deed purported to convey four hundred acres to the younger son, and the second deed conveyed to the elder son all the remaining part of the plantation. After the death of the grantor, it was found that the first deed, instead of conveying four hundred acres as was intended, conveyed only three hundred seventeen acres. Upon a petition brought by the younger son, the equity court decreed reformation of the deed. *Spencer v. Spencer* (Miss. 1917) 75 So. 770.

The jurisdiction of a chancery court to reform deeds, where by mistake they fail to carry out the intention of the parties, is well recognized. Here, as in all cases, the general rule, subject to some exceptions, is that equity will not aid a volunteer. This rule is strictly applied where reformation is sought against the voluntary grantor. *Lister v. Hodgson* (1867) L. R. 4 Eq. 30. On principle, the situation is quite different where the grantor himself seeks the reformation, and in such cases the courts generally grant the relief. *Lackersteen v. Lackersteen* (1861) 30 L. J. Eq. 5; *Mitchell v. Mitchell* (1869) 40 Ga. 11; *Crockett v. Crockett* (1884) 73 Ga. 647. More difficulty arises where the case comes up after the death of the grantor. Some jurisdictions lay down the principle that reformation will not be decreed save with the consent of all the parties, *Tuthill v. Katz* (1913) 174 Mich. 217, 140 N. W. 519; other jurisdictions take a broader view and decree reformation, even without the consent of the parties, where the facts show clear equities in favor of the complainant. *M'Mechan v. Warburton* [1896] Ir. L. R. 1 Ch. 435; see *Lister v. Hodgson*, *supra*. Thus where reformation tends toward a more just distribution of property, *M'Mechan v. Warburton*, *supra*; *Stedwell v. Anderson* (1851) 21 Conn. 139, the relief is granted, while if it tends toward a more unjust distribution, *Enos v. Stewart* (1902) 138 Cal. 112, 70 Pac. 1005; *Wiley v. Hodge* (1899) 104 Wis. 81, 80 N. W. 75; *Triesback v. Tyler* (1911) 62 Fla. 580, 56 So. 947, the court refuses to act. A clearer case is presented where the grantor has intended to and by a voluntary conveyance *inter vivos* has parted with his entire interest. Such is the instant case, where the rights of heirs and personal representatives of the grantor are eliminated. Some courts in such a case resort to a fiction of a family settlement, see *Miles v. Miles* (1904) 84 Miss. 624, 37 So. 112; *Cummings v. Freer* (1872) 26 Mich. 128, treating the situation as though the parties had held the land in common and then partitioned it, each conveyance serving as consideration for every other conveyance; other courts, adopting the same equitable doctrine that is adopted in the cases above, consider the case from the standpoint of a balance of equities and decree reformation where they find that a party holds property which in justice and good conscience should belong to another. *Wyche v. Greene* (1854) 16 Ga. 49; *Adair v. McDonald* (1871) 42 Ga. 506. In the principal case, the defendant had acted in a most unconscientious manner in relation to the conveyances, there were strong equities in favor of the complainant, and the court very justly in the exercise of its discretion ordered a reformation of the deed.

EJECTMENT—POSSIBILITY OF REVERTER AFTER A DETERMINABLE FEE—ALIENATION.—A grantor conveyed land with the provision that it should revert whenever the grantee ceased to use it for certain specified purposes. Afterwards he conveyed his remaining interest

to a second grantee unconditionally. After the grantor's death the first grantee ceased to use the land for the specified purposes. *Held*, the second grantee, and not the grantor's heirs, was entitled to the land. *Irby v. Smith* (Ga. 1917) 93 S. E. 877.

Determinable fees simple have clearly been recognized by the courts of this country, 1 Tiffany, Real Property, § 81, and under the conveyance in the principal case the first grantee takes a determinable fee simple, leaving a possibility of reverter in the grantor. *First Universalist Society v. Boland* (1892) 155 Mass. 171, 29 N. E. 524; *North v. Graham* (1908) 235 Ill. 178, 85 N. E. 267. It has often been said that a possibility of reverter after a determinable fee cannot be assigned, as it is not an interest in land but a mere possibility of receiving back an interest that has been granted to another. 1 Tiffany, *op. cit.*, § 81; *North v. Graham supra*; *Pond v. Douglass* (1909) 106 Me. 85, 75 Atl. 320; see *Vaughan v. Langford* (1908) 81 S. C. 282, 62 S. E. 316. There are, however, decisions holding that this possibility of reverter may be assigned. *Slegel v. Lauer* (1892) 148 Pa. 236, 23 Atl. 996; *Green's Adm'r v. Irvine* (Ky. 1902) 66 S. W. 278. The tendency of the courts would seem to be to allow a greater freedom of alienation, Tiedeman, Real Property (3rd ed.) § 307, so, although contingent remainders could not be assigned at common law, *Mudge v. Hammill* (1899) 21 R. I. 283, 43 Atl. 544, a number of courts, under statutes providing for the transfer of any interest in land, hold them alienable when the person who will take upon the happening of the contingency is ascertained. *Morse v. Proper* (1888) 82 Ga. 13, 8 S. E. 625; *McDonald v. Bayard Savings Bank* (1904) 123 Iowa 413, 98 N. W. 1025; *Godman v. Simmons* (1892) 113 Mo. 122, 20 S. W. 972. The principal case, in holding the possibility of reverter after a determinable fee assignable, is in keeping with this tendency. If the conveyance to the second grantee had been with covenants of title and for a valuable consideration, the case could also be supported upon the ground that he acquired an equitable right to have the land conveyed to him by the grantor's heirs when it reverted to them. *Goodson v. Beacham* (1858) 24 Ga. 150.

ELECTIONS—ERRORS IN PRINTING THE NAME OF A CANDIDATE ON THE BALLOT.—Election officials, through a mistake, printed the name of one, Johnson, for that of the contestant, as the regular Democratic nominee on the ballots of a certain district. The votes cast for Johnson were sufficient to determine the election. *Held*, three judges dissenting, that the votes cast for Johnson were intended to be cast for the contestant, the regular Democratic nominee, and, therefore, are to be counted for him. *Bradley v. Cox* (Mo. 1917) 197 S. W. 88.

It is a primary rule of election law that whenever possible, the voter's rights will be saved, *People ex rel. Hirsh v. Wood* (1895) 148 N. Y. 142, 42 N. E. 536; *Powers v. Smith* (1892) 11 Mo. 45, 20 S. W. 101, and unless a statute expressly stipulates that no ballots shall be counted for failure to comply with its provisions, it will be held to be directory rather than mandatory, where the irregularity in the ballots is attacked after the election. *Town of Grove v. Haskell* (1909) 24 Okla. 707, 104 Pac. 56. Furthermore, if the error in the ballots is caused by the fault of officials in preparing them, the court will effectuate the intention of the voter, if it can be clearly ascertained. It has, therefore, been established that slight errors in the printing of the ballot will not invalidate them. *North v. McMahan* (1910) 26

Okla. 502, 110 Pac. 1115; *Kiernan v. City of Portland* (1910) 57 Ore. 454, 111 Pac. 379. Moreover, where the irregularity consists in printing improper initials, *State ex rel. Willoughby v. Gates* (1876) 43 Conn. 533, or in the misspelling of the name of the candidate so as to present a wrong name *idem sonans* with the correct name, *Norton v. Kanawha County Court* (W. Va. 1917) 91 S. E. 258, the ballot will not be declared void. Votes cast for a candidate whose name has been irregularly placed on the ballot because of non-compliance with the election law, *State ex rel. Brooks v. Fransham* (1897) 19 Mont. 273, 48 Pac. 1; but see *Price v. Lush* (1890) 10 Mont. 61, 24 Pac. 749, or for a candidate whose name has been placed in the wrong party column, *Powers v. Smith, supra*, have nevertheless been declared valid votes for such candidate. But, if the intention of the voter cannot be ascertained, as in the case of a name completely misspelled, *Bartlett v. McIntire* (1911) 108 Me. 161, 79 Atl. 525, or where the wrong name has been placed on the ballot, *Ott v. Brisette* (1904) 137 Mich. 717, 100 N. W. 906, the better rule would seem to be to declare the election void as to that office. The court in the instant case seems, therefore, clearly wrong, for to support the holding it had to presume that the voter intends to vote for the Democratic nominee, regardless of the name placed on the ballot. It would seem, on the contrary, that the elector intends to cast his vote for the candidate whose name appears on the ballot, rather than for the party and its nominee whether or not the name of such nominee appear.

EMPLOYERS' LIABILITY ACT — INSURANCE — LEGISLATION. — A Massachusetts statute (Mass. Acts of 1914, c. 469) provides that whenever a person is insured against loss on account of injury or death of another for which the insured is liable, the liability of the insurer becomes absolute upon judgment recovered against the insured. In accordance with the terms of the statute, *held*, the plaintiff employee might proceed in equity and was given an equitable lien on the insurance money. *Lorando v. Gethro* (Mass. 1917) 117 N. E. 185.

Insurance contracts for the protection of the employer against loss may take the form of a "liability" contract, in which the insurance is against a liability incurred as the result of injuries inflicted upon an employee, *Hoven v. Employers' Liability Assur. Corp.* (1896) 93 Wis. 201, 67 N. W. 46, or an "indemnity" contract, which insures against satisfaction of a judgment recovered by an employee against the employer. *Pheiler v. Penn Allen Portland Cement Co.* (1913) 240 Pa. 468, 87 Atl. 623. Under an "indemnity" contract, the bankruptcy of the employer between judgment and its satisfaction substantially defeats the remedy of the employee, see *Pheiler v. Penn Allen Portland Cement Co., supra*, and it would seem that the earlier statutes, Ohio Gen. Code (1910) §§ 9510-2, which merely subrogated the employee to such rights as the employer had, could not remedy the situation, though recently under such an act the insurer was held liable for a judgment rendered against the insured who was insolvent. *Verducci v. Casualty Co. of Am.* (1917) 96 Oh. St. 483. The first step to give adequate protection to the employee in the event of the employer's bankruptcy was taken by the courts which, by a process of judicial legislation, interpreted an employer's "indemnity" insurance contract with a stipulation allowing the insurance company the right to defend the employee's action against the employer, as a "liability" contract. *Elliott v. Aetna Life Ins. Co.* (Neb. 1917) 161 N. W. 579;

Sanders v. Insurance Co. (1904) 72 N. H. 485, 37 Atl. 655; *contra*, *Carter v. Aetna Life Ins. Co.* (1907) 76 Kan. 275, 91 Pac. 178; see 10 Columbia Law Rev. 481. However, under the influence of Workmen's Compensation Acts the legislatures of various states have passed laws for the same purpose. Iowa Code (1913) § 2477-m48; Oregon Gen. Laws, 1915, c. 175; Minn. Laws of 1915, c. 209, § 31A; S. D. Laws of 1917, c. 278, § 3; N. Y. Laws of 1917, c. 524f, amending Insurance Law, § 109. Hence, "indemnity" contracts were practically discarded in the states where these insurance statutes have been passed, and the rights of the employee against the insurer were made absolute after judgment, as though the employee were an actual beneficiary under the contract. The statutes, however, have given different remedies. Massachusetts has created an equitable lien in favor of the employee immediately upon judgment, while in the Oregon a legal execution is allowed. Ore. Gen. Laws, *supra*.

EVIDENCE—ADMISSIBILITY WHEN ILLEGALLY OBTAINED.—The defendants were indicted for accepting and making bets. Detectives while making the arrest illegally seized papers and books belonging to the defendants, which were produced at the trial as evidence of the crime. Proof of conversations obtained by illegally tapping telephone wires was also introduced and in spite of the fact that the identity of the conversers was not ascertained until some time subsequent. *Held*, the evidence was admissible. *People v. McDonald et al.* (N. Y. App. Div. 2nd Dept. 1917) 8 Daily Record No. 259.

Since the first eight amendments to the federal constitution are applicable only to matters within federal authority, see *Twining v. New Jersey* (1908) 211 U. S. 78, 29 Sup. Ct. 14, it is obvious, that decisions construing the meaning and effect of the Fourth Amendment which deals with the right of the people to be secure against unreasonable search and illegal seizure of papers and effects, are not binding upon the state courts when they interpret similar provisions in state constitutions. The case of *Boyd v. United States* (1886) 116 U. S. 616, 6 Sup. Ct. 524, interprets the fourth and fifth amendments together and establishes the federal rule that a defendant cannot be compelled to produce evidence against himself by his performance of an affirmative act. 3 Wigmore, Evidence, § 2264. But that case and the decisions decided under it, though repeatedly relied upon, are evidently inapplicable in a state court and besides do not establish that evidence illegally seized is inadmissible. See *Adams v. New York* (1904) 192 U. S. 585, 24 Sup. Ct. 372. It is now well settled both in the federal and state courts, that evidence material to the issue is admissible in a criminal trial without inquiry as to whether or not it was obtained by illegal seizure. *People v. Adams* (1903) 176 N. Y. 351, 68 N. E. 636, *aff'd*. *Adams v. New York*, *supra*; *Imboden v. People* (1907) 40 Colo. 142, 90 Pac. 608; 14 Columbia Law Rev. 338; but see *State v. Sheridan* (1903) 121 Iowa 164, 96 N. W. 730. Since, moreover, evidence is not excluded because secured by other illegal methods, Wigmore, *op. cit.*, § 2183; 3 Chamberlayne, Evidence, 1740c, § 2299; it would follow logically that evidence obtained by illegally tapping telephone wires, should also be accepted. Although, in the principal case, sufficient proof to enable the witness to identify the speakers over the tapped wires was not obtained until subsequent to the over-hearing of the incriminating conversations, nevertheless, the

trial court was justified in admitting the testimony in view of the repeated conversations overheard. *Cf. People v. Dunbar Contracting Co.* (1915) 215 N. Y. 416, 109 N. E. 554; but *cf.* 11 Columbia Law Rev. 182.

EVIDENCE—CORROBORATION OF ACCOMPLICES.—The defendant, a physician, was convicted of the crime of abortion upon the testimony of two accomplices supplemented by other evidence of the pregnancy of the woman upon whom the abortion was committed, of her visit to the defendant's office, and of her miscarriage shortly thereafter. *Held*, the corroborating evidence was sufficient as it tended to satisfy the jury of the truth of the accomplices' testimony. *State v. Holden* (Ohio 1917) 20 N. P. (N. S.) 200.

There was no rule of common law requiring corroboration of the testimony of an accomplice although a jury was to be cautioned as to reliance upon it. 1 Greenleaf, Evidence § 380; *Allen v. State* (1859) 10 Oh. St. 287. But by statute, or, as in Ohio, independently of statute, in over half of our states the requirement of the corroboration of an accomplices' testimony has become a rule of law. 3 Wigmore, Evidence § 2056; see *State v. Robinson* (1910) 83 Oh. St. 136, 93 N. E. 623. Two views have been taken as to what is sufficient corroboration. The one generally recognized in England and the United States is that there must be some other evidence of the accused's actual participation in the offence. *Regina v. Dyke* (1838) 8 Car. & P. 261; *Commonwealth v. Holmes* (1879) 127 Mass. 424; *People v. Haynes* (N. Y. 1869) 55 Barb. 450. This view apparently was favored in Ohio before the decision in the principal case. See *State v. Robinson, supra*. Upon facts very similar to those in the principal case it has been held, in accordance with this view, that there was not a sufficient corroboration. *People v. Josselyn* (1870) 39 Cal. 393. The other view is that any evidence tending to convince the jury of the truth of the accomplices' testimony is sufficient corroboration. *State v. Howard* (1859) 32 Vt. 380; *State v. Ballew* (1900) 83 S. C. 82, 63 S. E. 688. The principal case expressly adopts this view. As a matter of principle it would seem that the requirement of corroboration of an accomplice's testimony is to verify its truthfulness and that any corroborating evidence is sufficient which tends to and which does convince the jury that the testimony of the accomplice is true. See *Tidd's Trial* (1820) 33 How. St. Tr. 1483. It is submitted, therefore, that the principal case is correct, though against the weight of authority.

INSURANCE—STANDARD POLICY—CANCELLATION CLAUSE.—In a suit upon a standard fire insurance policy, similar to that prescribed by statute in New York Insurance Law (N. Y. Consol. Laws, c. 33) § 121, *held*, in order to effect a cancellation the company should have returned the unearned premium upon giving notice of cancellation. *Continental Insurance Co. of N. Y. v. Peery* (Tenn. 1917) 197 S. W. 487.

The standard fire insurance policy adopted in New York in 1886 has been used or prescribed by statute in many other jurisdictions, Richards, Insurance (3rd ed.) § 277. The cancellation clause provides that the company may cancel by giving five days notice, and further, that "If this policy shall be cancelled * * *, the unearned portion [of the premium] shall be returned on surrender of this policy * * *." In construing this clause, a majority of the courts have held that

the policy is not cancelled by giving notice without returning the unearned premium at the same time, *Tisdell v. New Hampshire Fire Ins. Co.* (1890) 155 N. Y. 163, 49 N. E. 664; *Taylor v. Insurance Co.* (1909) 35 Okla. 92, 105 Pac. 351; *German Fire Ins. Co. v. Clarke* (1911) 116 Md. 622, 82 Atl. 974, though there are cases holding notice alone to be sufficient. *Davidson v. German Ins. Co.* (1909) 74 N. J. L. 487, 65 Atl. 996; *Webb v. Granite State Fire Ins. Co.* (1910) 164 Mich. 139, 129 N. W. 19; *Mangrum & Otter v. Law U. & R. Ins. Co.* (1916) 172 Cal. 497, 157 Pac. 239. The words of the statute seem clearly to indicate that the legislature intended that the policy should be cancelled upon the company's giving the required notice, reserving to the insured his right to the unearned premium. See, dissenting opinion, *Tisdell v. New Hampshire Ins. Co.*, *supra*. This result has been accomplished in the revision of the Insurance Law, N. Y. Gen. Laws of 1917. The new standard policy adopted by this enactment, 58 N. Y. L. J. 390, allows cancellation by the company on giving five days notice "with or without tender" of the unearned premium.

LANDLORD AND TENANT—EVICTION BY A STRANGER THROUGH PARAMOUNT TITLE—APPORTIONMENT OF RENT.—The plaintiff leased certain premises including a vault held under a revocable license, to defendant's testator, who had no notice, actual or constructive, of the license. The license was subsequently revoked, and the lessee excluded from possession of the vault. In an action for rent, *held*, the defendant was entitled to a reduction of rent proportionate to the reduced value of the leasehold. *Fifth Ave. Building Co. v. Kernochan* (N. Y. Ct. of App., 1917) 117 N. E. 579.

An eviction has always been held to be a good defense to an action for rent. 1 *Tiffany*, Landlord and Tenant, § 182. Where the eviction, either entire or in part, is by the landlord, the obligation to pay rent is suspended during the period of exclusion. *Kuschinsky v. Flanigan* (1912) 170 Mich. 245, 136 N. W. 362. But no apportionment of rent is allowed in the case of a partial eviction by the lessor, on the equitable ground that a wrongdoer cannot apportion his own wrong. *Smith v. McEnany* (1897) 170 Mass. 26, 48 N. E. 781. The tenancy, however, still continues. 2 *Tiffany*, *op cit.*, § 185 h. Where there is an entire eviction by a stranger claiming by virtue of title paramount, the tenancy terminates. *Wheelock v. Warschauer* (1867) 34 Cal. 265. In case of partial eviction by a superior landlord, there will be an abatement of the rent commensurate with the diminished value of the estate, *Cheairs v. Coats* (1900) 77 Miss. 846, 28 So. 728, for, although an entire contract could not at common law be apportioned, the apportionment of rent as to estate was a well recognized exception. *Van Rensselaer v. Bradley* (N. Y. 1846) 3 Den. 135. The courts regard this defense to rent either as a counterclaim or recoupment for breach of the covenant for quiet enjoyment, *Hollbrook v. Young* (1871) 108 Mass. 83; *Eldred v. Leahy* (1872) 31 Wis. 546, or as a case of failure of consideration. *Friend v. Supply Co.* (1895) 165 Pa. 652, 30 Atl. 1134; *Gates v. Goodloe* (1879) 101 U. S. 612. Where there is no express covenant, and a rule of law prevents an implied covenant from arising, the courts rely solely upon the latter doctrine. *Carter v. Burr* (N. Y. 1862) 39 Barb. 59; *Gates v. Goodloe*, *supra*. The court, in the principal case, although recognizing an implied covenant for quiet enjoyment, nevertheless rests its decision on failure of consideration, and denies that the reduction of rent is by way of

counterclaim for breach of such covenant. This ground of decision would seem to be in harmony with the later American cases, and to afford an equitable and workable rule.

MARRIAGE—EFFECT OF STATUTES PROHIBITING REMARRIAGE OF DIVORCED PERSONS.—The deceased married the defendant within three months after the former's divorce contrary to a statute prohibiting such remarriages. Objection was made to the appointment of the defendant as administratrix, on the ground that she was not the deceased's lawful widow. *Held*, since the statute did not expressly declare the remarriage void, it will be considered voidable, and not open to attack after the death of the intestate. *Woodward v. Blake* (N. D. 1917) 164 N. W. 156.

The earlier cases construing such statutes take the position that the legislature intended the second marriage to be void, whether the statute expressly declared it so or not. *Cox v. Combs* (1848) 47 Ky. 231; *Matter of Borrowdale* (N. Y. 1882) 28 Hun 336. But a contrary construction was later adopted in accordance with which the mere prohibition of remarriage did not, in the absence of other evidence of legislative intent, render the marriage void. *Crawford v. State* (1895) 73 Miss. 172, 18 So. 848. See Schouler, *Domestic Relations* (5th ed.) § 14. If the prohibition was imposed in order to permit the bringing of an appeal from the decree of divorce, there can, by the weight of authority, be no valid marriage within the statutory period, *In re Smith's Estate* (1892) 4 Wash. 702, 30 Pac. 1059; *Eaton v. Eaton* (1902) 66 Neb. 676, 92 N. W. 995; *Hooper v. Hooper* (1913) 67 Ore. 187, 135 Pac. 525, for as long as the decree is assailable it is not considered final. See *Warter v. Warter* (1890) 15 P. D. 152; *State v. Yoder* (1911) 113 Minn. 503, 130 N. W. 10. But even in such cases if the statute merely declares the act "unlawful" it has been held that the remarriage is voidable only. *Conn v. Conn* (1895) 2 Kan. App. 419, 42 Pac. 1006; *Mason v. Mason* (1884) 101 Ind. 25; see *McLennan v. McLennan* (1897) 31 Ore. 480, 50 Pac. 802. *A fortiori*, if the statute attaches a criminal penalty to the remarriage, it would seem that the legislature intended that the punishment should fall on the wrongdoer alone, and that the innocent spouse and offspring should be protected; yet the courts have generally declared the remarriage void. *Calloway v. Bryan* (1859) 51 N. C. 569; *White v. White* (1870) 105 Mass. 325; *Barfield v. Barfield* (1904) 139 Ala. 290, 35 So. 884; *contra*, *Park v. Barron* (1856) 20 Ga. 702, on the ground that the criminal penalty makes the contract illegal. *Oritt v. Smith* (1895) 68 Vt. 35, 33 Atl. 769. But marriage is more than a contract. It is a status which the law endeavors to protect whenever policy permits. Holding the remarriage voidable only is good policy, for it preserves the rights of the innocent parties to the second marriage, while it does not preclude a prosecution for bigamy.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—"OCCUPATIONAL DISEASES".—Plaintiff sued under the Workmen's Compensation Act for recovery for a neurosis caused by pressure on the brachial plexus from a leaning posture while at work as a cigar maker. *Held*, the injury complained of is not a "personal injury arising out of and in the course of employment" within the meaning of the statute. *In re Maggelet* (Mass. 1917) 116 N. E. 972.

The fact that the injury complained of is an "occupational disease" is no objection at common law to an action on the case based on the

employer's negligence, *Wiseman v. Carter etc. Co.* (1916) 100 Neb. 584; 160 N. W. 895; *Thompson v. United Lab. Co.* (1915) 221 Mass. 276, 108 N. E. 1042, or on his breach of statutory duty. *Jellico etc. and Co. v. Walls* (1914) 160 Ky. 730, 170 S. W. 19. But the courts are in conflict concerning a recovery for occupational diseases under Workmen's Compensation Acts. See *Miller v. American etc. Co.* (1916) 90 Conn. 349, 97 Atl. 345; Honnold, Workmen's Compensation § 138. Most jurisdictions deny relief whether the statute provides for recovery in case of "accident", *Liondale etc. Works v. Riker* (1914) 85 N. J. L. 426, 89 Atl. 929, or of "personal injury", *Adams v. Acme etc. Works* (1914) 182 Mich. 157, 148 N. W. 485; *Miller v. American etc. Co., supra*; *Industrial Comm. v. Brown* (1915) 92 Oh. St. 309, 110 N. E. 744; *contra, Johnson's Case* (1914) 217 Mass. 388, 104 N. E. 735. In England recovery is limited to the diseases specified in the act unless of accidental origin, 5 & 6 Edw. VII. c. 58 § 8, sched. 3; *Eke v. Hart-Dyke* [1910] 2 K. B. 677, and since a gradual deterioration from over-work is not an accident within the British statute, there will be no recovery in such a case. *Walker v. Hockney Bros.* (Eng. 1909) 2 Butterworth W. C. C. 20. But the Massachusetts Act requires only a "personal injury," and this having been established, even though the injury is a rare ailment not among recognized vocational diseases, *Hurler's case* (1914) 217 Mass. 223, 104 N. E. 336, there will be a recovery if the employment contributes at all to the disability. *Madden's Case* (1916) 222 Mass. 487, 111 N. E. 379. The objection that no time can be fixed for the occurrence of the injury, *Liondale etc. Works v. Riker, supra*, is overcome by regarding it as beginning when the employee becomes unable to work. *Johnson's Case, supra*. These broad holdings would seem to have justified allowing a recovery in the principal case, but in limiting their application the court reached a sound and just conclusion.

MORTGAGES — BANKRUPTCY OF MORTGAGOR — MORTGAGEE'S RIGHT TO RENTS.—A foreclosure sale of realty did not realize enough to satisfy a third mortgage held by the plaintiff. A trustee in bankruptcy of the assets of the mortgagor had collected rents from the mortgaged premises between adjudication and foreclosure. After foreclosure, the plaintiff seeks to have the rents applied to meet the deficiency. *Held*, the mortgagee is entitled to have the rents applied for this purpose. *In re Dooner v. Smith* (D. C., D. N. J. 1917) 243 Fed. 984.

Although the mortgagor in possession is entitled to rents, *Teal v. Walker* (1884) 111 U. S. 242, 4 Sup. Ct. 420, yet when it appears that the proceeds from a foreclosure sale of the mortgaged premises will not be sufficient to satisfy the mortgage debt, the mortgagee may have a receiver appointed to collect and apply the rents from the date of application to the satisfaction of his claim. 2 Jones, Mortgages (7th ed.) § 670. The question presented in the instant case is whether the mortgagee is entitled to have the rents applied to the satisfaction of his claim even though no receiver for his benefit has been appointed. One court has held a mere demand by the mortgagee is sufficient to entitle him to the rents, *In re Bennett* (C. C. 1877) 3 Fed. Cas. No. 1313, while there is authority for holding the appointment of a receiver for the benefit of the mortgagee to be essential. *Hunter v. Hays* (C. C. 1877) 12 Fed. Cas. No. 6906; see *In re Foster* (D. C. 1872) 9 Fed. Cas. No. 4963, *aff'd Foster v. Rhodes* (C. C. 1874) 9 Fed. Cas. No. 4981. These latter cases, however, are based on the

theory that since the possession of the trustee is for the benefit of the general creditors, the latter will be entitled to the rents, unless a receiver for the benefit of the mortgagee is appointed, and it would seem, therefore, that the position of these courts is unsound. The trustee is an officer of the court, *Crosby v. Spear* (1904) 98 Me. 542, 57 Atl. 881, invested with possession of the property by operation of law, 30 Stat. 565, 9 U. S. Comp. Stat. (1916) § 9654, and he has other functions besides protecting the general creditors. *In re Industrial, etc. Co.* (D. C. 1908) 163 Fed. 390. On principle, the trustee as a court officer should make the most equitable disposition of the rent without the interposition of the receiver for the benefit of the mortgagee, *In re Industrial, etc. Co.*, *supra*; see *In re Torchia* (C. C. A. 1911) 188 Fed. 207, and, therefore, the holding of the instant case is sound.

NEW TRIAL—GRANTING UPON CONDITION—NEWLY DISCOVERED EVIDENCE.—After verdict for the plaintiff, defendant moved for a new trial on the ground of newly discovered evidence, submitting an affidavit by one of the plaintiff's important witnesses at the first trial to the effect that he, the affiant, had then committed perjury. It appeared that this witness and his family had been supported financially by the defendant since the trial and that the witness has left the state under pressure of indictment by defendant. *Held*, two judges dissenting, a new trial would be granted upon condition that plaintiff be allowed to read the former testimony of this witness before a submission of the subsequent affidavit. *Fried v. New York N. H. & H. R. R.* (2nd Dept. 1917) 178 App. Div. 309, 165 N. Y. Supp. 495.

The granting of a motion for a new trial, where it is not sought as a statutory right or on the ground of error made in the law, lies within the discretion of the trial judge, whether it be sought on the ground that the verdict is contrary to the evidence, *Thompson v. Warren* (1903) 118 Ga. 644, 45 S. E. 912, or on the ground either of interference with the jury, *Chicago Junction Ry. v. McGrath* (1903) 107 Ill. App. 100, *aff'd*, 203 Ill. 511, 68 N. E. 69, or of newly discovered evidence. *Parsons v. Lewiston, etc. Ry.* (1902) 96 Me. 503, 52 Atl. 1006; *Whitehead v. Breckenridge* (1904) 5 Ind. Terr. 153, 82 S. W. 698; *Bunker v. United Order of Forester* (1906) 97 Minn. 361, 107 N. W. 392. Unless the trial judge has evidently abused his discretion in refusing a motion for a new trial so that a miscarriage of justice is a very probable result, such a refusal will not be reversed by the higher court. *Smith v. Bailey* (1874) 26 Oh. St. 1; *Godfrey v. Godfrey* (1906) 127 Wis. 47, 106 N. W. 814. The granting of a new trial, as in the principal case, being discretionary, is a favor and not a right. It has been held, therefore, that a new trial can be granted on such conditions as will insure substantial justice to both parties to the suit. *Brenzinger v. American Exch. Bank of Duluth* (1900) 19 Ohio C. C. 536; *Fry v. Stowers* (1900) 98 Va. 417, 36 S. E. 482. In the principal case, there were special circumstances from which the court as a whole inferred that the perjured witness was under the control of the defendant and had left the state with its connivance, and further it had not been determined by a jury whether the testimony given at the trial was false or whether the subsequent affidavit seemingly made while the witness was under the control of the defendant was false. The fact that § 830 of N. Y. Code of Civ. Proc. does not provide for the admissibility of former testimony in such a

case as the principal one, as a matter of right, does not invalidate the reading of such testimony as a condition for a new trial granted as a favor. Hence, it would seem that the court in the principal case wisely exercised its discretion in the furtherance of justice.

PERPETUITIES — NEW YORK RULE — CONSTRUCTION — SUBSHARES.— The testator devised his estate to trustees, to pay the income to his three children during their mother's life, after which the *corpus* was to be divided equally among them. He then provided: "in case of the decease of either or any of my said children without leaving a lawful issue, then the share of such deceased child or children shall fall into and be a part of the residue of my estate, and the share of the survivor or survivors . . . be proportionately increased thereby." *Held*, this provision did not violate the New York Rule Against Perpetuities, which forbids (N. Y. Real Prop. Law, § 42) the suspension of the absolute power of alienation for longer than two lives in being; that, should two children predecease their mother, the subshare of the child first dying which had enriched the share of the child next dying would not again fall into the trust estate, but pass directly to the survivor. *Central Trust Co. v. Falck* (1917) 177 App. Div. 501, 164 N. Y. Supp. 473.

Since the Rule Against Perpetuities is not a rule of construction, but a peremptory command of law, the object of which is to defeat intention, a will is first to be construed as if no rule existed, and the rule then "remorselessly applied". Gray, *Rule Against Perpetuities* (3rd ed.) § 629. But, if the language is ambiguous, the presumption is that the testator intended to create a valid interest. Gray, *op. cit.*, § 633. While clearly recognizing these principles, see *Geiber's Estate* (1900) 196 Pa. 366, 46 Atl. 497; *Dime Savings Co. v. Watson* (1912) 254 Ill. 419, 98 N. E. 777, the courts show a noticeable tendency to construe wills so as to save them from rule, provided this can be accomplished without doing violence to the testator's language. *Henry v. Henderson* (1911) 101 Miss. 751, 58 So. 354; *Heisen v. Ellis* (1910) 247 Ill. 418, 93 N. E. 362; *Kratz's Appeal* (1897) 180 Pa. 127, 129, 36 Atl. 570. The effect is virtually to make the rule one of construction for ascertaining intention. Indeed, the courts have gone so far as to violate the plain intention of the testator by placing a strained construction upon his language. *St. John v. Dann* (1895) 66 Conn. 401, 404, 34 Atl. 110; *cf. Edgerly v. Barker* (1891) 66 N. H. 434, 31 Atl. 900. In New York, where the Rule Against Perpetuities is stricter, and often harsher in its operation, this liberal tendency is particularly marked, *Vanderpoel v. Loew* (1889) 112 N. Y. 167, 19 N. E. 481, the courts even reading expressions into a will to avoid the rule; *Appell v. Appell* (1917) 177 App. Div. 570, 164 N. Y. Supp. 246; while it is a settled principle that, where language is susceptible of two constructions, one of which violates the rule, that which is valid shall be adopted. *Host v. Hover* (1865) 33 N. Y. 593. The principal case illustrates this liberal tendency. While the court placed an ingenious interpretation upon the will for the obvious purpose of thwarting the rule, the decision is amply supported by precedent. *Chustain v. Tilford* (1910) 138 App. Div. 746, 123 N. Y. Supp. 513, *aff'd* 201 N. Y. 538; *Schey v. Schey* (1909) 194 N. Y. 368, 87 N. E. 817; but see *Simpson v. Trust Co.* (1908) 129 App. Div. 200, 113 N. Y. Supp. 370.

PRINCIPAL AND AGENT—CONTRACT FOR EXCLUSIVE AGENCY.—The plaintiff appointed the defendant its exclusive representative for the sale of its products in Minnesota and agreed to pay the defendant a commission on all accepted orders procured by him. While this contract was in force, a Minnesota dealer, from whom the defendant had tried, without success, to secure an order, went to Chicago and placed an order with the plaintiff's agent there for goods which were shipped to Minnesota. In an action by the plaintiff the defendant set up as a counterclaim the amount of his commission on the above order. *Held*, the defendant was not entitled to the counterclaim as the order was given outside of the defendant's territory. *Aluminum Products Co. v. Anderson* (Minn. 1917) 164 N. W. 663.

Cases do not often arise in which the courts are called upon to interpret the effect of a provision giving an agent an "exclusive agency" for the sale of goods in a territory. The parties usually stipulate more fully as to their respective rights, or there is some trade usage that is controlling. *Cf. McGann v. Ruggles-Coles, etc. Co.* (1914) 164 App. Div. 253, 149 N. Y. Supp. 698; *Garfield v. Peerless Motor Co.* (1905) 189 Mass. 395, 75 N. E. 695. When the courts have been called upon to interpret this provision for an "exclusive agency", standing by itself, their decisions have been in conflict. Some courts have held that the agent is given by this provision the sole right to make sales of goods that are to be used, to the principal's knowledge, in the agent's territory. *Illsley v. Peerless Motor Co.* (1913) 177 Ill. App. 459; *cf. Thompson-Huston Elec. Co. v. Berg* (1895) 10 Tex. Civ. App. 200, 30 S. W. 454. Other courts have held that its only effect is to give the agent the sole right to make sales, as the principal's agent, within that territory. *Haynes Auto Co. v. Woodhill Auto Co.* (1912) 163 Cal. 102, 124 Pac. 717; *cf. Golden Gate Packing Co. v. Farmers Union* (1880) 55 Cal. 606; *Gay Oil Co. v. Muskogee* (1911) 97 Ark. 502, 134 S. W. 639. The principal case, in following the latter authorities, would seem to be carrying out the fair meaning of the contract.

REAL PROPERTY—RESTRICTIVE COVENANTS — INTERPRETATION. — The plaintiff brought an action to enforce a restrictive covenant in a deed reciting that nothing but a single detached residence, to be used for residence purposes only, should be built. The property had been occupied by a Catholic sisterhood of twelve to fifteen women who held religious services, and occasionally initiated new members; in the invitations to these ceremonies, and in the telephone book, the building was referred to as the "Convent Chapel" and the "Ursuline Convent". *Held*, the covenant was not violated. *Hunter Tract Impr. Co. v. Corporation of the Catholic Bishop of Nisqually* (Wash. 1917) 167 Pac. 100.

Although a covenant that premises be used for "private residence purposes only" is violated by the erection of an apartment house, flat house, tenement, *etc.*, see *Koch v. Gorruflo* (1910) 77 N. J. Eq. 172, 75 Atl. 767, yet if the word "private" were omitted, such structures would be within the requirements of the covenant. *McMurtry v. Philipps Invest. Co.* (1898) 103 Ky. 308, 45 S. W. 96; *Tillotson v. Gregory* (1908) 151 Mich. 128, 114 N. W. 1025. Where, as in the principal case, a covenant provides for a single residence or a single dwelling only, there is a conflict of authority as to whether a building accommodating more than one family is within its terms. Since the general rule of construction is in favor of a free use of the property, *Schoonmaker v. Heckscher* (1916) 171 App. Div. 148, 157 N. Y.

Supp. 575, it appears that the better view is that the number of persons or families occupying the dwelling is immaterial in such a case. *Hutchison v. Ulrich* (1893) 145 Ill. 336, 34 N. E. 556; *contra, Harris v. Roraback* (1904) 137 Mich. 292, 100 N. W. 391. Where a covenant prohibited any building other than a dwelling house, a hospital was held to be a violation. *Smith v. Graham* (1914) 161 App. Div. 803, 147 N. Y. Supp. 773. A covenant that premises shall be used for residence purposes only would seem to have been violated by the erection of a church. *Cf. Hisey v. Eastminster Church* (1908) 130 Mo. App. 566, 109 S. W. 60; *Crofton v. St. Clement's Church* (1904) 208 Pa. 209, 57 Atl., 570. Although a convent may be more than a mere residence and embody within it a school or a church, the term does not necessarily connote more than a dwelling for a religious community. See *Scott Co. v. The Archbishop of Oregon* (Ore. 1917) 163 Pac. 88. Since the restriction is not against names but against uses, *cf. Smith v. Graham, supra; Scott v. The Archbishop of Oregon, supra*, the decision of the court in the principal case, in view of the peculiar facts, would seem to be correct.

SPECIFIC PERFORMANCE—ORAL CONTRACT TO DEVISE—SERVICES AS PART PERFORMANCE.—Intestate orally agreed with plaintiff's stepfather in 1865, that she would adopt plaintiff and make plaintiff her sole heir, in consideration of the control and custody of the child, and her services as a daughter. The plaintiff fully performed, but was never adopted, and no will was made. The plaintiff brought a bill to be declared the equitable owner of all the property left by intestate. Prior to 1905, in California, an oral contract to make a will was valid. *Held*, as the evidence clearly established the contract, plaintiff was entitled to the property. *Steinberger v. Young* (Cal. 1917) 163 Pac. 432.

The general rule is that a contract to devise realty to another or to make him an heir must be in writing, since it is a contract for the transfer of an interest in land, and covered by the Statute of Frauds. Gardner, Wills (2nd ed.) 68. But the California Civil Code did not require a writing in such a case, prior to the amendment of 1905. *Rogers v. Schlotterback* (1914) 167 Cal. 35, 138 Pac. 728. In most jurisdictions, however, an oral contract to devise property cannot be enforced, *Pond v. Sheean* (1890) 132 Ill. 312, 23 N. E. 1018, unless it is removed from the operation of the statute by part performance. *Gladville v. McDole* (1910) 247 Ill. 34, 93 N. E. 86. Putting the promisee in possession of the property in pursuance of the contract is a sufficient part performance. *Smith v. Pierce* (1892) 65 Vt. 200, 25 Atl. 1092. But the courts are divided as to whether the surrender of a child for adoption, together with filial services, is a sufficient part performance to remove the bar of the statute. Those cases which hold that it is, seem to proceed on the theory that the non-performance of the agreement would work a fraud on plaintiff, who could not be put in *statu quo*, *Sharkey v. McDermott* (1887) 91 Mo. 647, 4 S. W. 107; *Healy v. Healy* (1900) 55 App. Div. 315, 66 N. Y. Supp. 927; and, therefore, a trust is imposed on the land. *Van Dyne v. Vreeland* (1858) 12 N. J. Eq. 142. The better view and the weight of authority seem to be that performance by the child will not take the oral contract out of the statute, since such services are not clearly referable to the contract. *Snyder v. French* (1916) 272 Ill. 43, 111 N. E. 489; *Grant v. Grant* (1893) 63 Conn. 530, 29 Atl. 15; *Shahan v. Swan*

(1891) 48 Oh. St. 25, 26 N. E. 222; 11 Columbia Law Rev. 93. Where the contract relates to both realty and personalty and is inseparable, it follows that the agreement may not be enforced as to the personalty either. *Dicken v. McKinley* (1896) 163 Ill. 318, 45 N. E. 134. Ordinarily no fraud on the plaintiff would result, as he receives the benefit of support and education, and may recover the value of his services in *quantum meruit*. *Ellis v. Cary* (1889) 74 Wis. 176; 42 N. W. 252; 17 Columbia Law Rev. 155. The principal case seems correct, in the absence of any statute.

WILLS—EXECUTION—ATTESTATION AT REQUEST OF TESTATRIX.—The testatrix, who could speak or understand only the Creek language, requested a witness who understood both Creek and English, to attest her will and to request the two other witnesses to attest. On the probate of the will, *held*, this did not comply with the Oklahoma statute which required that three attesting witnesses subscribe the will at the request of the testatrix. *Hill v. Davis* (Okla. 1917) 167 Pac. 465.

Although there is no general statutory requirement that the witnesses to a will must subscribe only at the request of the testator, nevertheless, even in the absence of statute provisions the testator should request the witnesses to subscribe, so as to refute any inference of fraud. This request, however, may be indicated by word or conduct and no formal request is necessary. *Woodstock College of Baltimore v. Hankey* (Md. 1917) 99 Atl. 962. But even where the statute requires that the witnesses must subscribe at the request of the testator, N. Y. Decedent Estate Law (N. Y. Consol. Laws, c. 18) § 21, subd. 4, the courts are inclined to uphold substantial compliance with the statute. *Matter of Nelson* (1894) 141 N. Y. 152, 36 N. E. 3; *Matter of Will of Cottrell* (1884) 95 N. Y. 329. Similarly, in the analogous case of a statutory requirement of publication of the will by the testator to the witnesses, a substantial compliance with the statute has been held sufficient. *Brinkerhoff v. Remson* (N. Y. 1841) 26 Wend. 325; *Perham v. Cottle* (1916) 98 Misc. 48, 162 N. Y. Supp. 21. The reason for this attitude of the courts would seem to be a desire to prevent unreasonable hardship; but where there is any evidence of fraud, or if an equivocal inference can be drawn from the conduct of the testator, the statute will be construed literally. *Matter of Kenney* (1917) 179 App. Div. 258, 166 N. Y. Supp. 478; 1 Schouler, Wills (5th ed.) § 329. In the principal case, though the intention of the testatrix seems to have been carried out faithfully, the court was warranted in requiring strict compliance with the statute, since the rights of the testatrix should be guarded carefully where the transactions are carried on through interpreters. See *Stein v. Wilzinski* (N. Y. 1880) 4 Redf. 441.

BOOK REVIEWS.

FRANCIS GOERTNER, *Editor-in-Charge.*

EQUITY AND ITS RELATIONS TO COMMON LAW. BY WILLIAM W. BILLSON. Boston: BOSTON BOOK CO. 1917. pp. xii, 226.

This volume is a study of legal development comprising eight essays dealing with various phases of English equity as an ameliorating system of substantive law. The author's main thesis is that equity was not, as some writers have contended, restricted to the relief of such common law defects as were due to inadequacies of procedure, but that it was and is a true system of substantive law conflicting at many points with the rules of the common law because of the different standards of legal morality developed by the two systems. While the writer adopts a more elaborate classification than is here indicated, he points out that equity developed a system of substantive law differing from the legal system in three main directions which were not mere corrections in legal procedure. They were: (a) a more liberal interpretation of documents than that adopted by law; (b) the development of the doctrines of fraud and mistake, and a more extensive application of them than was given to them by the courts of law; (c) the development of the doctrine that equity might restrain the unconscientious exercise of a legal right on moral grounds.

When one reflects that equity often restrained the prosecution of actions at law, and that the exercise of a large part of its jurisdiction involved for all practical purposes a negation of the rights of the legal owner, it seems extraordinary that any writer should ever have asserted broadly that there was no conflict between the doctrines of law and equity, and that any one should have found it necessary or desirable to have written a book to assert the contrary doctrine. Certain statements, however, of Professor Langdell and Professor Maitland, which have been interpreted, with doubtful accuracy, as going to the extreme length of denying any inconsistency between the doctrines of law and equity, have of late been the occasion of much legal writing of which this book is the most recent and extended example. Indeed, the statement that equity and law do not conflict is a statement often made correctly with reference to the law administrative agencies of the two systems rather than to their conflicting doctrines. Equity did not restrain a judge or officer of the law courts, nor, after the subsidence of the famous controversy between Coke and Lord Ellesmere, did the law courts attempt to interfere with suitors in equity. Nor, indeed, did equity deny the operation of rules of law. It sought only to counteract them by compelling the defendant to relinquish the benefits of those rules in accordance with its decree. Until this decree became operative neither courts of law nor equity denied the operation of rules of law to define the substantive rights of the parties. In this narrow sense law and equity did not conflict; but that in a broader sense there was a conflict in that equity often adopted a different doctrine than

that of the law courts and based its action upon it, does not now seem fairly open to question.

In his examination of this subject, the author traces in considerable detail the development of the independent doctrines of equity in matters of interpretation, in the law of waste, forfeiture, the defective execution of powers, marriage settlements, merger, and the doctrine of equitable conversion. Separate chapters are devoted to the subjects of fraud, and of uses and trusts. In dealing with these topics he stresses particularly the substantive character and the superior morality of those doctrines of equity which conflict with legal rules.

In thus emphasizing this conflict between the substantive rules of law and equity, one gains the impression that the author does not give sufficient recognition to the part which procedure played, not only in stimulating the development of equity's conflicting theories of substantive rights, but in making them effective by the process of counteraction of legal rules through the operation of the decree *in personam*. This process was not a thinly disguised fiction by which the chancellor attempted to conceal the fact that he was setting up a system of law conflicting with but ultimately controlling the doctrines of common law. It was a real operative fact which made the decree in equity all-powerful over legal rules and judgments when it was rendered and obeyed, but which, on the other hand, left substantive legal rights unaffected until the rendition of the decree.

It is idle to suppose that, taken as a whole the chancellors possessed an intelligence and morality superior to that of the judges, or that the superior morality of our equity is attributable to any such differences in the intellectual and moral qualities of those who administered the two systems. We must look rather for the explanation of this difference in the superior powers possessed by the chancellors, which enabled them to give effect to their ideas of conscientious conduct by circumventing the legal rules which they did not deny. To the law courts no such procedure was open. Thus, while the law courts determined rights existing in the plaintiff according to established rules, courts of equity proceeded on the theory that they were imposing a personal obligation on the defendant to surrender some of his legal rights in favor of the plaintiff. That the same idea persists in modern jurisprudence is revealed by the statement that the law judgment dates from the date of the action and the equity decree from the date of its rendition. The distinction is one which has not lost its significance even with the merger of the two systems.

The author suggests at the outset that the distinction between the law and equity systems has in a sense been "worn out". To the extent that law has largely taken over equity's view of interpretation and adopted many of its doctrines this is both true and fortunate. But there will always be the need of the two forms of relief, the one typified by the relief afforded by a legal judgment, the other typified by the relief afforded by the equity decree *in personam*. Whatever the form of procedure by which these results are accomplished, or the name given to it, and whether administered by the same or distinct courts, the distinction itself is one of substance and it is not outworn.

The theory of modifying the ultimate consequences of an established legal rule by directing the exercise of it in a particular manner has been the most prolific source of law improvement in the entire history of

English law. The departure from the established rule of law which was impossible for the judge presented no difficulties to the chancellor, who accepted the rule but restrained the defendant from taking the benefit of it on moral grounds affecting the conscience of the defendant. A study of the decisions of courts of equity in more recent times convinces one that this is still one of the most important avenues of law improvement. Moreover, one of the most beneficent aspects of equity has been its discretionary jurisdiction and this was made possible by its procedure *in personam* rather than by any moral superiority of its judges or of its doctrines of substantive law. It was the elasticity and adaptability of the equity which gave greater opportunity for the exercise of discretion than was possible in an action brought merely for the recovery of a money judgment. So long, therefore, as the courts retain a power in special cases, where the right of money recovery is inadequate, to direct specific things to be done, thus giving full play to the restriction of general rules by the personal judgment, and to the exercise of judicial discretion, the fundamental distinction between law and equity will not be outworn and our system of law will have retained its most potent agency, apart from legislation, for administering justice adapted to the needs of special cases and in harmony with an enlightened morality.

A part of the concluding chapter on uses and trusts is devoted to an elaboration of the view that the right of the *cestui que trust* is a property right in the trust *res*, or, as is sometimes said, a right *in rem* in the trust property. Indeed the author goes so far as to say that the right of the *cestui que trust* is not a right *in personam*. He demonstrates this (p. 218) in the following manner:

"If the right of the *cestui que trust* were really a right *in personam*, it would follow of course that in equity as well as at law all elements of ownership, both formal and beneficial, must be vested in the trustee, and that upon the death of the *cestui que trust* without heirs, they must remain in the trustee, free from the extinct trust obligation. The acknowledged rule is the contrary of this: and proceeding upon the principle that only the formal elements of title are in the trustee, the beneficial elements under such circumstances are held to escheat to the state as unowned property."

The author admits that such is not the rule under the English law in the case of real estate, and that upon the death of the *cestui que trust* of real estate without heirs, the trust is terminated and the trust property is held by the trustee for his own benefit. But he relies on the rule, in the case of personal property, that the right of the *cestui que trust* who dies without next of kin passes to the Crown or the State as *bona vacantia*, as supporting his proposition.

By a similar course of reasoning one might prove that a bond or promissory note was not a right *in personam*, because on the death of the obligee or payee without heirs or next of kin his rights would vest in the Crown or the State.

There are of course many difficulties in maintaining consistently the proposition that the right of the *cestui que trust* is a property right in the trust *res*. The author overcomes the difficulty of the rule

that the *cestui* cannot claim the trust property which has escheated upon the death of the trustee without heirs, by asserting that this rule would have been changed had the rule not ultimately been changed by statute. The difficulty that the trustee may alone maintain an action against the trespasser or disseisor is brushed aside by reference to the cases in which the *cestui que trust* is allowed to join the trustee with the tortfeasor and secure relief where the trustee in violation of his trust refuses or neglects to act. Other more troublesome difficulties are not referred to, such as, for example, that the infant *cestui que trust* is generally barred by the Statute of Limitations from asserting rights in trespass, trover, or for disseisin, whenever the trustee is barred, although the Statute of Limitations does not run against the claim of an infant *cestui* against third persons during his infancy where the wrong complained of is a breach of trust.

Nor is any explanation offered for the result reached in those cases in which third persons are held responsible in equity because they have assisted the trustee in a breach of trust without, however, actually interfering with or acquiring the trust *res*; or of the rule of law that the purchaser of trust property with notice who converts the trust property into other property is made a constructive trustee of the newly acquired property; or of those decisions in which the court has compelled those who acquire trust real estate located in a foreign jurisdiction, to hold the property for the injured *cestui*. It would seem that these and many other cases of liability of third persons to the *cestui que trust* can be explained only on the theory that the right of the *cestui que trust* is a right *in personam* against the trustee, but that the right of the *cestui* against the trustee gives rise to a right *in rem* with respect to third persons, just as a right in a contract is a right *in rem* with respect to third persons regardless of the question whether the obligation of the obligor is an obligation with respect to property or not. The significance of this view lies in the fact that equity imposes on an indefinite number of persons, not purchasers for value, the equitable duty of refraining from conduct which aids or makes more effective the trustee's breach of his obligation to the *cestui*, and which thus amounts to an interference with the plaintiff's right *in personam* against the trustee. Such a conception of the right of the *cestui que trust* gives full scope to the application of those doctrines of conscientiousness which have characterized the development of equity, whereas the tendency to be noted in this book of ascribing to equitable rights the character of a property right in the *res* held subject to it, tends more and more to identify them with the fixed rules of property in which the emphasis is laid upon the formal right of the plaintiff rather than the moral duty of the defendant. Perhaps no better illustration of the truth of this statement could be found than the judgment in *London County Council v. Allen* ([1914] 3 K. B. 642) in which the court rendered what one of the judges referred to as a "regrettable" decision in holding that the plaintiff who had sold land subject to a restrictive covenant was not entitled to restrain the defendant, a purchaser from the covenantor with notice, who was proceeding in violation of the terms of the covenant. The decision was regrettable only because the court attempted to liken the plaintiff's equitable right to a property right

in rem in the land, which according to settled rules had no validity against the subsequent purchaser of the land. Had the emphasis been placed on the defendant's duty to refrain from any conduct interfering with the plaintiff's equitable right *in personam* upon the covenant, a more fortunate result would have been reached, and one more consistent with the doctrines which have characterized the decisions of courts of equity.

There are in the book many statements of minor importance which will not win ready assent; such, for example, as the statement (p. 82) that a "contract for the sale of foreign lands cannot be specifically enforced against the subsequent purchaser although he bought with notice of the contract." (Cf. 17 Columbia Law Rev. 498, n. 89); the statement (p. 114) that equity gave effect to assignments of choses in action by presuming or inferring executory agreements to assign or convey; that the true basis of the jurisdiction in specific performance of contracts is that equity regards as done what ought to be done; that in the case of a contract for the sale of an ordinary chattel not specifically enforceable a trust will be implied in favor of the vendee if the purchase price has been paid.

There is a tendency in the book to over-generalize and to speculate upon what the chancellors might have done under other conditions which never existed (as for example p. 177) and at times the author states as though it were something novel or profound, matter which has long been the stock in trade of legal educators. (*Vide* his treatment of the well-recognized historical fact that rules of law tend to survive the causes which gave them birth, p. 28). No reference is made to a number of law review articles in which views similar to those advanced by the author are discussed. (See for example: 17 Columbia Law Rev. 269; 17 Columbia Law Rev. 467; 11 Michigan Law Rev. 537; 26 Yale Law J. 710, 767.

Despite these minor criticisms, the book gives much evidence of diligent study and ripe scholarship. Especially interesting is the manner in which it brings in juxtaposition many doctrines of equity not often studied from the point of view of comparative law. The book should be read by students and teachers of equity, and will undoubtedly provoke much thought and discussion. It is a hopeful sign that a member of the bar who has devoted most of his life to practice should have found the time and inclination to have carried on a study of law on its historical and philosophical side and to have given the fruits of his labors to his professional brethren.

Harlan F. Stone.

BOOKS RECEIVED:

A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL, IN THE UNITED STATES. By FREDERICK N. JUDSON. Second Edition. St. Louis: F. H. THOMAS LAW BOOK CO. 1917. pp. xxx, 1144.

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CODIFYING THE LAW OF CONDITIONAL SALES.

The validity of contracts for the sale of goods upon the condition that the property therein shall not pass until the price has been paid, although possession is given to the buyer, is well established at common law. These contracts are "legally impossible" in Louisiana, under the civil law of that state;¹ and in few common-law jurisdictions such a reservation of property is worthless as against the buyer's creditors or vendees.²

The Illinois decisions declare such reservations to be in fraud of the chattel mortgage act, operating to deceive and defraud third persons "by the appearance of ownership in one, while the title is really in another".³ The act in question has been understood to indicate a rule of public policy avoiding all agreements for liens or reservations which are not registered in accordance with its provisions.⁴

Pennsylvania courts appear to have been misled by cases decided in England, under the "reputed ownership" provisions of

¹*Barber Asphalt Paving Co. v. St. Louis Cypress Co., Ltd.* (1908) 121 La. 152, 46 So. 193, overruling *Baldwin v. Young* (1895) 47 La. Ann. 1466, 17 So. 883, and applying Civil Code Article 2456, *vis.*, "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid." Compare this with § 1 (3) of the Uniform Sales Act: "A contract to sell or a sale may be absolute or conditional."

²*Coors v. Reagan* (1908) 44 Colo. 126, 96 Pac. 966; *Wender Blue Gem Coal Co. v. Louisville Property Co.* (1910) 137 Ky. 339, 125 S. W. 732; *Lincoln v. Quynn* (1888) 68 Md. 299, 11 Atl. 848, 6 Am. S. R. 446, and cases in the next four footnotes.

³*Ketchum v. Watson* (1860) 24 Ill. 591, 592, citing *Thompson v. Yeck* (1859) 21 Ill. 73. See comments on the Illinois cases in *Harkness v. Russell* (1886) 118 U. S. 663, 678, 7 Sup. Ct. 51, and in *Jones v. Clark* (1894) 20 Colo. 353, 38 Pac. 371.

⁴*Hervey v. Rhode Island Locomotive Works* (1876) 93 U. S. 664, 672.

the bankruptcy statute, which they treated as based on common-law principles.⁵ But in Pennsylvania it has been easy to evade the operation of this doctrine. All that the parties need do is for the seller to lease the goods to the buyer who agrees to pay the price under the guise of rent, and the transaction is valid not only between the parties, but against the buyer's creditors and purchasers.⁶

In both states conditional sales of railroad equipment, and in Pennsylvania conditional sales of fixtures, also, have been validated by legislation,⁷ provided the contracts are made and registered in accordance with the statutory requirements.

The New York decisions were conflicting, for a time, as to the rights of innocent purchasers for value from a conditional vendee,⁸ but in 1869 the court of appeals settled the controversy in favor of the conditional vendor and affirmed the view of the common law which prevailed in England and in nearly all of our jurisdictions.⁹ In an earlier case,¹⁰ Judge Comstock remarked:

"If the question had never been decided, it might, perhaps, be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt, in the nature of a personal mortgage."

The Kentucky courts hold that such sale "contracts are mortgages, and are not valid against purchasers for value or creditors unless recorded"; and, though recorded, whenever they relate to property to be subsequently acquired, they are, in that state, void against the mortgagor's creditors or purchasers.¹¹ In Illinois, however, the conditional sale contract is not treated as a mortgage, and recording it as a mortgage does not operate as constructive notice to third parties.¹² This is the prevailing rule.

⁵Burdick, Sales (3rd ed.) 218 and authorities cited.

⁶Goss Printing-Press Co. v. Jordan (1895) 171 Pa. 474, 32 Atl. 1031.

⁷Ill. Laws of 1893, 166, Jones & Add. Ill. 1913, §§ 8799-8800; Pa. Laws of 1883, No. 176, 4 Purdon's Dig. Pa. 1910, 3917, Pa. Laws of 1915, No. 386, at pp. 866-869.

⁸Wait v. Green (1867) 36 N. Y. 556 and the prior cases cited in the opinion, as well as 2 Kent, Comm. 497, 498.

⁹Ballard v. Burgett (1869) 40 N. Y. 314. The authorities are cited and discussed with much care, especially in the opinion of Lott, J.

¹⁰Herring v. Hoppock (1857) 15 N. Y. 409, 414.

¹¹Wender Blue Gem Coal Co. v. Louisville Property Co., *supra*, footnote 2, at pp. 347-348.

¹²Gilbert v. National Cash Register Co. (1898) 176 Ill. 288, 52 N. E. 22.

Even in the jurisdictions above referred to, the rule generally obtains that a conditional sale contract is valid as between the parties and as against creditors and purchasers with notice.¹³

Undoubtedly, a conditional sale does enable the purchaser to impose upon third parties. Having possession of the property with the consent of the seller, and with the right to become owner upon payment of the price without further act on the part of the seller, he has the appearance of being the present owner. Persons give him credit, or buy the property from him, on the strength of this appearance. As early as 1870, Vermont enacted that no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser, should be valid against attaching creditors or subsequent purchasers, unless a written memorandum signed by the purchaser, witnessing such lien and the sum due thereon should be recorded in the town clerk's office as required by the statute.¹⁴ A similar act was passed in Iowa,¹⁵ three years later, and in Missouri in 1877.¹⁶ The object of these statutes was judicially declared to be,¹⁷

"to prevent secret and unrecorded transactions and contracts of sale from being used to the detriment of unsuspecting creditors of, or purchasers from, the vendee of personal property apparently the owner thereof."

New York legislation upon this topic began with an act requiring conditional sales of railroad equipment and rolling stock to be in writing, duly acknowledged and recorded; and requiring each locomotive or car to be properly labeled with the vendor's name, in order to be valid "as to any subsequent judgment creditor of or any subsequent purchaser for a valuable consideration, without notice."¹⁸ In the following year, an act was passed covering

¹³*Coors v. Reagan*, *supra*, footnote 2; *Hoozen, etc. Co. v. Burdette* (1894) 153 Ill. 672, 39 N. E. 1107; *Lyon & Healy v. Walldren* (1916) 201 Ill. App. 609; *Lincoln v. Quynn*, *supra*, footnote 2.

¹⁴*Kelsey v. Kendall* (1875) 48 Vt. 24. South Carolina passed an act on this subject as early as 1843—now § 3740, Code of 1912—construed in *Herring & Co. v. Cannon* (1883) 21 S. C. 212.

¹⁵*Knoulton v. Redenbaugh* (1874) 40 Iowa 114.

¹⁶*Peet v. Spencer* (1886) 90 Mo. 384.

¹⁷*Coover v. Johnson* (1885) 86 Mo. 533, 538.

¹⁸N. Y. Laws of 1883, c. 383. With some modifications the act is now § 61 of the Personal Property Law.

all conditional sales of goods and chattels.¹⁹ It invalidated such sales "as against subsequent purchasers and mortgagees in good faith", unless the contract or a true copy was filed in a specified office, subject to inspection by "all persons interested". The contract ceased to be valid at the end of a year from filing, unless a true copy was refiled. Provision was made for satisfying and discharging of record these instruments.

Ten years later, the legislature excepted from the operation of the act of 1884 a considerable list of chattels, "provided that the contract for the sale of the same be executed in duplicate, and one duplicate shall be delivered to the purchaser."²⁰ It was further enacted that if the vendor retook goods of this character, he should retain them for thirty days, before selling. During this period the vendee, or his successor in interest, had the right to "fulfill such contract or purchase". If he did not avail himself of this right, the vendor could then proceed to sell the goods at public auction, retaining from the proceeds any balance due him for the price and the expense of storing, advertising, and selling; and paying any surplus to the vendee or his successor in interest. Later these exceptions were stricken from the statute,²¹ but the provisions for holding the property for redemption, and for the application of the proceeds of sale were made applicable to all conditional sale transactions.²²

It will be observed that the New York legislation aims not only to secure innocent third persons from being imposed upon by the conditional vendee in possession, but also to protect the vendee from the common-law consequences of default. It proceeds upon the theory that a vendee, who has paid a part of the purchase price, is entitled to an interest in the goods, which he should not forfeit by mere default in a subsequent payment: that he should be treated as though he were a mortgagor of the goods, and be accorded an opportunity to redeem. Between the two lines of legislation, represented respectively by the Iowa and the New York statutes above

¹⁹N. Y. Laws of 1884, c. 315. With modifications it forms §§ 62-64 of the Personal Property Law.

²⁰N. Y. Laws of 1894, c. 420. The goods so excepted were "household goods, pianos, organs, scales, engines, boilers and portable furnaces, and boilers for heating purposes, portable saw-mills and saw-machines, threshing machines and horse powers, mowing machines, reapers and harvesters and grain drills, with their attachments; vehicles, coaches, hearses, carriages, buggies and phaetons, bicycles and tricycles of all kinds, and any other device for locomotion by human power".

²¹N. Y. Laws of 1905, c. 503.

²²N. Y. Personal Property Law, §§ 65-67.

referred to, we have, in the thirty states which have legislated on this topic, a medley of acts not easy to classify. Moreover, judicial decisions are distressingly divergent upon many questions which have arisen under conditional sale contracts.²³

Accordingly, the Commissioners on Uniform State Laws have had prepared a draft of a Uniform Conditional Sales Act, which, it is believed, will improve this branch of the law in every jurisdiction, and, if it is everywhere enacted, will result in unification of doctrine and decision.²⁴

The draft proceeds upon the theory that, while a conditional sale is to be distinguished from a chattel mortgage, the rights of the conditional vendor and vendee are similar in many respects to those of mortgagor and mortgagee. In the language of its draftsman it conforms to the chattel mortgage theory. At the meeting of the commissioners, last summer, it was suggested that the act be discarded, and, in its place a brief statute be recommended, to the effect that every conditional sale be declared a chattel mortgage and be subjected to existing statutes on that topic.²⁵ The suggestion did not meet with favor. It was the opinion of the great majority of the commissioners, that a conditional sale differs, in substance as well as in form, from a chattel mortgage, and that sound business policy is subserved by continuing this distinction. The primary purpose of a chattel mortgage is to secure a debt due the mortgagee by giving him a defeasible title to certain goods of the mortgagor. The primary purpose of a conditional sale is to prevent ownership of certain goods passing to the purchaser, until a stipulated event—usually the payment of the price.²⁶

²³See 3 Cornell Law Quarterly 2; Burdick, Law of Sales (3rd ed.) 216-221.

²⁴A copy of the third tentative draft is appended to this article. It was prepared by Professor George G. Bogert of Cornell University College of Law, now Major Bogert, Assistant Judge Advocate at Camp Dix. Its history is briefly sketched by the learned draftsman in 3 Cornell Law Quarterly 1.

²⁵Although the advocate of this view did not refer to the Texas statute, its purport is similar, to wit: "All reservation of the title to or property in chattels, as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages". 4 Vernon's Sayles' Tex. Civ. Stat. 1914, Art. 5654. Harling v. Creech (1895) 88 Tex. 300, 31 S. W. 357.

²⁶Roberston v. Campbell and Wheeler (1800) 6 Va. *421, *429, where the court said: "The great *desideratum*, which this Court has made the ground of their decision, is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the

There is no doubt that business interests prefer the conditional sale to the chattel mortgage. This is shown by the immense volume of conditional sale transactions, by the increasing legislation on this topic, and, especially, by the fact that nearly every state, including Illinois, Kentucky, Louisiana and Pennsylvania, has validated and regulated by statute, conditional sales of railroad equipment.²⁷

At common law, the conditional sale possessed for the seller decided advantages over the chattel mortgage. It provided him with a speedy and effective method of "self help". It gave to the buyer no equity of redemption.²⁸ It was often used by the seller as a means of oppressing the needy and as a vehicle of extortion.²⁹ While the Uniform Conditional Sales Act undertakes to prevent the seller from using his contract as an instrument of oppression or extortion, it secures to him every legitimate and fair advantage which that form of contract possesses over the chattel mortgage.

Let us examine the act with some care. The first section is devoted to "definitions" and need not detain us long. It should be noted, however, that a sale is conditional under this statute, whether the condition of passing the property is the payment of part or all of the price or "the performance of any other condition or the happening of any contingency".³⁰ The definition includes also any bailment or leasing of goods, under which the bailee or lessee is to pay as compensation a sum substantially equivalent to the value of the goods.³¹ Such bailment or lease is a mere subter-

price fixed? Or, whether, the object was the loan of money, and a security or pledge for the re-payment, intended?" This case was followed in *Earp v. Boothe* (1874) 65 Va. 368, 374, where it was said: "Generally speaking the difference between them is, that the one is a *security* for a debt, the other a *purchase* for a price paid, or to be paid, to become absolute in a particular event".

²⁷Major Bogert notes the striking similarity of the railroad equipment statutes, and adds: "These existing acts are said to have been passed as a result of the efforts of the Baldwin Locomotive Works and other corporations interested in the sale of railway equipment". 3 Cornell Law Quarterly 9.

²⁸*Bingham v. Vandegrift* (1890) 93 Ala. 283, 286, 9 So. 280; *Hughes v. Harlam* (1901) 166 N. Y. 427, 431, 60 N. E. 22.

²⁹*Earp v. Boothe*, *supra*, footnote 26.

³⁰The draft follows on this point existing legislation in Iowa, Nebraska, New Jersey, New York, Virginia, West Virginia, Wisconsin and Wyoming.

³¹This codifies the doctrine of such cases as *Singer Sewing Machine Co. v. Holcomb* (1874) 40 Iowa 33, and *Bramhall, Deane Co. v. McDonald* (1916) 172 App. Div. 780, 158 N. Y. Supp. 736 (a lease of a kitchen and serving pantry equipment for a rent of \$1,809, the agreed value thereof).

fuge and will not relieve the parties from compliance with the conditional sales statute.³²

Section two has undergone several changes from the original draft, as the result of careful and thorough consideration, both in the committee on commercial law and in the conferences of the commissioners. Instead of following the negative phraseology of existing statutes, its form is affirmative. "Every provision reserving property in the seller * * * shall be valid * * * if such contract is in writing" and duly filed. In at least two states, as pointed out above, the conditional sale is legally invalid, and fear was expressed that the negative form of statement (no provision reserving property, *etc.* shall be valid, unless the contract is in writing and filed) would result in an anomalous situation, should the Uniform Act be passed in those states.³³ Under this section, as it now stands, writing and filing of conditional sale contracts are required only "as against subsequent purchasers, mortgagees and pledgees from the buyer, for value, though without notice of the seller's title, and also as against creditors of the buyer who levy upon or attach the goods, though without notice of such title". This is an extension of the requirement as to creditors in New York,³⁴ a modification of it in some states,³⁵ and an adoption of existing law in others.³⁶

Either the original contract or a copy may be filed. Doubt was expressed by several commissioners about permitting the use of an unattested copy. As failure by the seller to file a true copy, or the original, would result in his losing the statutory protection, and as he will prefer to keep the original for use, in case of litigation, it would seem that he may be trusted to file a true copy. The provision appears to be self-executing. Moreover, the great majority of existing statutes permit the filing of an unattested copy.

Counsel for manufacturers, who do a large business on the conditional sales plan, asked that sellers have thirty days within which to file the writing. The seller's place of business is often far removed from the filing office, and to require immediate filing, it

³²*Gardner v. Town of Cameron* (1913) 155 App. Div. 750, 140 N. Y. Supp. 634, *aff'd.* without opinion (1915) 215 N. Y. 682, 109 N. E. 1074.

³³Major Bogert in 3 Cornell Law Quarterly 5.

³⁴N. Y. Personal Property Law § 62 makes void the unfiled contract only as against purchasers, mortgagees and pledgees.

³⁵Georgia, North Dakota, South Carolina and Washington protect creditors whose rights accrue subsequent to the sale.

³⁶Substantially the rule in Nebraska, New Jersey, Vermont and Wyoming.

was insisted, would operate harshly against him. This view was acceded to by the committee on commercial law,³⁷ but the conference were of the opinion that the seller could always prevent the buyer from obtaining possession, until the writing had been filed. Some delay in actual delivery of goods may be the result, but greater protection is afforded to purchasers and lien creditors of the conditional buyer; and the protection of these classes is the primary object of conditional sales statutes. Constructive notice begins with filing or registration.

Existing statutes differ as to the place of filing. The proposed law requires the writing to be filed in the office where deeds of real property are recorded, in the registration district (be it city, county, or other political subdivision) in which the goods are kept after the sale. It is believed that this section will work not only uniformity, but improvement in this branch of the law.³⁸

Several states have special statutory provisions as to conditional sales of fixtures, and section four of the present draft is modeled after them. Of course, if the articles are sold to become an integral part of the realty, as in the case of nails, laths, beams, shingles and the like, a reservation of title to them as chattels is a legal impossibility. This is recognized in the first sentence. But when the goods are to be so affixed as to be readily severable, there is no reason why the seller should not be allowed to reserve title thereto, provided a proper record of the contract be made in the office where a deed of the realty would be recorded. Such a record imposes no lien upon the realty. Nor does it operate in favor of mortgagees of the buyer, who become such prior to the conditional sale, or with notice of its existence.³⁹

The fifth section contains an admirably condensed statement of the existing statutory rule as to conditional sales of railroad equipment, and does not call for special comment.

³⁷Massachusetts and Tennessee do not require filing or registration; Connecticut requires "filing within a reasonable time"; District of Columbia, Oregon and Washington within ten days; New Hampshire within twenty, while Georgia and Vermont extend the time to thirty days. Most jurisdictions require immediate filing; or, to put it in another way, invalidate conditional sales as against purchasers and lien creditors until filing.

³⁸See 3 Cornell Law Quarterly 6-8.

³⁹*Tift v. Horton* (1873) 53 N. Y. 377 (engine and boiler to be put into the buyer's grain elevator); *York Mfg. Co. v. Cassell* (1906) 201 U. S. 344, 26 Sup. Ct. 481 (ice-making machinery; contract valid as against purchaser's trustee in bankruptcy, though not filed); *Holt v. Henley* (1914) 232 U. S. 637, 34 Sup. Ct. 459 (automatic sprinkler system and equipment, remained the personality of seller, as against prior mortgagee and trustee in bankruptcy of buyer); *Ratchford v. Cayuga County C. S. & W. Co.* (1916) 217 N. Y. 565, 112 N. E. 447, L. R. A. 1916E, 615 (a refrigerating plant remained personality).

Goods are often put by the owner into the possession of another as agent for sale. Such a transaction is not a conditional sale and is not subject to its rules but to those of agency.⁴⁰ If, however, they are put into the possession of one whose business it is to deal in such goods, and the owner consents, either expressly or impliedly, to the resale by the possessor, a reservation of title ought not to avail him against such second purchasers for value and without notice. His conduct should estop him from claiming the goods as against them.⁴¹ If, however, the conditional vendor does not give his consent to a resale, and does not know that the buyer is a dealer in such goods, there is no ground for estoppel.⁴² Such is the doctrine, codified in the sixth section, which relieves the *bona fide* purchaser from a conditional vendee, who received the goods for the known purpose of resale, from examining the records. He is exempted from constructive notice. The last clause of the section, however, very properly subjects to such notice all other persons, including creditors, trustees in bankruptcy, and purchasers with actual notice.⁴³

Section eight requires the sale contract to be refiled at the expiration of three years, and annually thereafter in the case of goods, other than railway equipment, and fifteen years in the case of such equipment. The refiling is to be made within thirty days of the expiration of the prescribed period, and is to consist in a copy of the contract and a statement that the contract is still in force and of the amount remaining unpaid. This provision is in the interest of purchasers and creditors, relieving them from examining the records through an indefinite period.

The earliest conditional sale statutes made no provision for compelling a cancellation of the registered or filed contract. Later

⁴⁰*Keystone Watch Case Co. v. Fourth Street Natl. Bank* (1900) 194 Pa. 535, 45 Atl. 328; *Richardson Mfg. Co. v. Brooks* (1901) 95 Me. 146, 49 Atl. 672; *Norris v. Boston Music Co.* (1915) 129 Minn. 198, 151 N. W. 971, L. R. A. 1917B, 615.

⁴¹*Columbus Buggy Co. v. Turley & Parker* (1896) 73 Miss. 529, 537, 19 So. 232, 32 L. R. A. 260, 55 Am. S. R. 550 ("To permit the vendor in a conditional sale of personal property, bought in the course of trade for resale, to retain title and at the same time authorize the buyer to resell, would operate as a fraud upon innocent purchasers.").

⁴²*Fairbanks Co. v. Graves* (1907) 90 Miss. 453, 459, 43 So. 675 ("There is nothing in the law which prohibits one merchant from selling an article of merchandise to another merchant, with reservation of title until the purchase money is paid, unless the article sold is meant to be resold, or is of such character as that it may be fairly inferred, when the sale is made, that the purpose of the purchase is to resell it.").

⁴³*Mishawaka Woolen Mfg. Co. v. Stanton* (1915) 188 Mich. 237, 154 N. W. 48, L. R. A. 1917B, 651, with note 658-667.

legislation has corrected this defect, and its best features are reproduced in section nine. Upon written demand, after performance of the condition, the seller must execute and deliver a "statement of satisfaction" or pay a penalty of five dollars. This satisfaction must be filed by the proper officer upon the tender of the statutory fee. Thereupon the record is cleared and evidence is preserved of ownership in the conditional vendee or his successor in interest.

While the conditional vendee before default is entitled to use the property and even to dispose of his interest in it, he should not be allowed to remove it from the registration district, nor to sell or encumber his interest without giving notice to the seller. Sections ten and eleven cover this topic with commendable care. The seller is permitted to stipulate in his original contract against removal of the goods to another district or state. In the absence of such stipulation, the buyer may remove the goods, upon giving written notice of five days. After such removal, the seller must file the contract in the district to which the goods are removed, so that third parties there may have notice of the possessor's lack of ownership. If the buyer removes the goods without such notice, the seller may retake them and deal with them as in the case of default of payment. If the buyer removes, injures, destroys or conceals the goods "maliciously or with intent to defraud" he becomes liable, under section twelve, to criminal punishment.

The courts have experienced much difficulty in determining questions arising from the vendee's default and the vendor's recaption of the goods,⁴⁴ and their decisions have been far from harmonious. It is the purpose of sections thirteen to twenty-six inclusive to clear away all difficulties and to insure uniformity in judicial determinations on this topic.

The seller is allowed to retake the goods, upon the buyer's default, without avoiding the contract or imperilling his right to the balance of the purchase price. Nor is this right of recaption lost by suing or obtaining judgment for the price.⁴⁵ Of course, he is not permitted to retake the goods, after he has collected the price, nor

⁴⁴Some of these are stated and considered in *Dudley v. Abner* (1875) 52 Ala. 572, 578; *Preston v. Whitney* (1871) 23 Mich. 260; *McGinnis v. Savage* (1887) 29 W. Va. 362, 370, 1 S. E. 746.

⁴⁵*Burdick*, Law of Sales (3rd ed.) 220 and cases cited in notes 1 and 2; *Guth Piano Co. v. Adams* (1916) 114 Me. 390, 96 Atl. 722; *Ratchford v. Cayuga County C. S. & W. Co.*, *supra*, footnote 39; *contra*, *Eilers Music House v. Douglass* (1916) 90 Wash. 683, 156 Pac. 937, L. R. A. 1916E, 613; *Norman v. Meeker* (1916) 91 Wash. 534, 158 Pac. 78, Ann. Cas. 1917D, 462.

after he has claimed a lien on the goods, or attached them, or levied upon them as the property of the buyer.⁴⁶

At common law, as we have seen, the defaulted buyer had not the right of redemption, and the seller could hold the retaken goods and whatever of the price he had received. The statute, however, secures to him an opportunity for redemption, in one of two ways. If the seller gives him notice that the goods will be retaken upon default, the buyer has twenty days at least within which to perform his broken obligations. In case he does not perform, the seller may retake the goods, resell them in accordance with the statutory requirements, and recover from the buyer any balance due on the purchase price, after applying the net proceeds towards such price.⁴⁷ When the seller does not give such notice, he is required to hold the goods for ten days after retaking, during which time the buyer may redeem by performing his broken obligations and paying "the expenses of retaking, keeping and storage".

Section fourteen, providing for notice of intention to retake, is new legislation, and was inserted upon the suggestion of business men with large experience in conditional sales. It secures to the buyer ample opportunity to perform his obligations, if he cares to protect his equity of redemption but does not force the seller, who may live at a distance, to make two trips to the locality of the goods and to incur the expense of storing the goods during the period of grace accorded the buyer for redemption.

If the seller considers it unsafe to leave the goods in the hands of the buyer, he is allowed by section fifteen to retake the goods immediately upon the buyer's default. In such case, he must hold them within the state (unless they are railway equipment, when they may be removed from the state) for ten days. If they are perishable, he may sell at once. Upon written demand by the buyer, he shall furnish a statement of the sum due and the expenses of retaking, keeping and storage. Failure to comply with this requirement subjects him to payment of a fine of ten dollars, and of damages suffered by the buyer because of the failure. The business men, who appeared before the committee on commercial law, declared that defaulting buyers rarely sought to avail themselves of the right to redeem; but the committee and the conference believed

⁴⁶*Kirk v. Crystal* (1907) 118 App. Div. 32, 103 N. Y. Supp 17, aff'd. without opinion (1908) 193 N. Y. 622, 86 N. E. 1126.

⁴⁷This is quite in accordance with the rule laid down in *Harkness v. Russell*, *supra*, footnote 3.

that this right should be definitely assured and regulated by the statute.

It will be observed that the act does not countenance the doctrine that the seller rescinds the contract by retaking the goods and holding them as security for the balance due.⁴⁸ If, however, he holds the retaken goods as sole owner, his act should be treated as a rescission.⁴⁹ This is the rule approved by section eighteen, when the buyer has paid less than fifty per cent. of the price. In such a case, the probability is that the buyer's equity of redemption is worthless; that the goods, depreciated by use, will not bring enough to yield a surplus over the balance of the price and expenses of retaking, storing and selling. Hence, the seller is allowed to keep the goods as his own and discharge the buyer from all obligation under the contract, unless the latter, within ten days after retaking makes a written demand for resale. When less than half of the price has been paid, the seller is accorded a like option of notifying the buyer that he will not hold the goods as his own, but will deal with them on the buyer's behalf and look to him for any consequent deficiency.

If the buyer has paid more than half of the price, the seller has not the option referred to in the last preceding paragraph, but is bound to bring the goods to a resale, under carefully prescribed but entirely fair requirements, (§ 16) or the buyer may recover from him all payments made under the contract, with interest. (§ 23).

Experience has shown that not only is the buyer frequently inferior to the seller in business shrewdness, but that the seller resorts to unfair practices throwing the buyer off his guard. Hence, modern legislators are in the habit of putting the conditional buyer, as presumably the poorer, the weaker and the more credulous party, under statutory tutelage, and incapacitating him from waiving in advance the legislative provisions in his favor.⁵⁰ After the

⁴⁸The doctrine of the statute is applied in such cases as *International Harvester Co. v. Bauer* (1917) 82 Ore. 686, 162 Pac. 856; see opinion of Sanborn, J., in *Manson v. Dayton* (C. C. A. 1907) 153 Fed. 258.

⁴⁹*Madison River Livestock Co. v. Osler* (1909) 39 Mont. 244, 102 Pac. 325; *I. X. L. Stores Co. v. Moon* (Utah 1916) 162 Pac. 622.

⁵⁰*Desseau v. Holmes* (1905) 187 Mass. 486, 73 N. E. 656. The rule, that a waiver of equity of redemption by borrowers, who are apt to be improvident persons, in straits to obtain money, is void as against public policy, was declared to be peculiarly applicable to conditional sales "which are made so commonly by shopkeepers in supplying householders of small means with furniture and other similar articles." 187 Mass., at p. 482. See *Adler v. Weis & Fisher Co.* (1916) 218 N. Y. 295, 299, 112 N. E. 1049, and cases referred to in the opinion.

contract has been made, he is deemed competent to take care of himself, and may validly waive statutory benefits.⁵¹

As the buyer in a conditional sale transaction gets more than a contract right to acquire ownership, as he gets possession and an equitable interest in the goods, (§ 25), the Uniform Act properly provides that the "seller shall be liable to the buyer for the breach of all promises and warranties, express or implied".⁵²

It is hoped that every reader of this article will study carefully the draft which follows, and will send to the chairman of the committee on commercial law,⁵³ any criticism, suggestion or commendation which he deems important. He may be sure that his views will be welcomed and that any assistance given in perfecting this Uniform Condition Sales Act will be appreciated.

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⁵¹N. Y. Personal Property Law §§ 62-65; Uniform Conditional Sales Act § 24.

⁵²*Rogers & Thornton v. Otto Gas Engine Works* (1910) 7 Ga. App. 587, 67 S. E. 700; *Peuser v. Marsh* (1915) 167 App. Div. 604, 153 N. Y. Supp. 381.

⁵³The chairman of the committee is Hon. Walter G. Smith, 711 Witherspoon Bldg., Philadelphia, Pa.

APPENDIX

AN ACT TO MAKE UNIFORM THE LAW OF CONDITIONAL SALES.

Be it Enacted by

Section 1. (Definitions.) The term "conditional sale", as used in this act, means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of the contract.

The term "seller" as used in this act means the person who sells or leases the goods covered by the conditional sale, or any legal successor in interest of such person.

The term "buyer" as used in this act means the person who buys or hires the goods covered by the conditional sale, or any legal successor in interest of such person.

The term "goods" as used in this act means all chattels personal other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming a part of land which are agreed to be severed before sale or under the conditional sale.

The term "filing district" as used in this act means the subdivision of the state in which conditional sale contracts, or copies thereof, are required by this act to be filed.

The phrase "performance of the condition" as used in this act means the occurrence of the event upon which the property in the goods is to vest in the buyer, whether such event is the performance of an act by the buyer or the happening of a contingency.

Section 2. (Contract to be Filed.) Every provision reserving property in the seller while possession of the goods is in the buyer shall be valid between buyer and seller without writing or filing; and, except as provided in Section 11, the reservation shall be valid as against subsequent purchasers, mortgagees and pledgees from the buyer, for value, though without notice of the seller's title, and also as against creditors of the buyer who levy upon or attach the goods, though without notice of such title, if such contract is in writing and the original or a copy thereof shall have been filed as hereinafter prescribed, previous to such sale, mortgage, pledge, levy or attachment. Except as provided in Section 5, it shall not be necessary to the validity of such conditional sale contract, or in order to entitle it to be filed, that such contract be acknowledged or attested.

Section 3. (Place of Filing.) The conditional sale contract or copy shall be filed in the office where deeds of real property are recorded in the (city,) county, (or registration district) in which the goods are kept after the sale. This section shall not apply to the contracts described in Section 5.

Section 4. (Fixtures.) If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be readily severable, the reservation of property shall be void after the goods are so affixed. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be readily severable, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers or mortgagees of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller and stating that the goods are or are to be affixed thereto, shall be filed previous to such purchase or mortgage in the office where a deed of the realty would be recorded. As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof but to be readily severable, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed previous to the affixing in the office where a deed of the realty would be recorded.

Section 5. (Railroad Equipment or Rolling Stock.) No conditional sale of railroad, street or interurban railway equipment or rolling stock shall be valid as against the purchasers, mortgagees, pledgees and creditors described in Section 2, unless the contract shall be acknowledged by the buyer or attested in like manner as a deed of real property, and the contract, or a copy thereof, shall be filed in the office of the Secretary of State; and unless there shall be plainly and conspicuously marked upon each side of any engine or car so sold the name of the seller, followed by the word "owner".

Section 6. (Conditional Sale of Goods for Resale.) When goods are sold under a conditional sale contract, and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract, or a copy thereof, shall be filed according to the provisions of this act; but as to other persons the transaction shall be governed by Section 2.

Section 7. (Filing.) The filing officer shall mark upon the contract or copy filed with him the day and hour of filing and shall file the contract or copy in his office for public inspection. He shall

keep a book in which he shall enter the names of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of the goods, the price named in the contract and the date of cancellation thereof; except that in entering the contracts mentioned in Section 5 the Secretary of State shall record either the sum remaining to be paid upon the contract or the price of the goods. Such book shall be indexed under the names of both seller and buyer. For filing and entering such contract or copy the filing officer shall be entitled to a fee of (ten cents), except that for filing and entering a contract described in Section 5 the Secretary of State shall be entitled to a fee of (one dollar).

Section 8. (Refiling.) The filing of conditional sale contracts provided for in Sections 2, 3 and 4 shall be valid for a period of three years only. The filing of the contract provided for by Section 5 shall be valid for a period of fifteen years only. The validity of the filing may in each case be extended for successive additional periods of one year from the date of refiling by filing in the proper filing district a copy of the original contract within thirty days preceding the expiration of each period, with a statement attached signed by the seller, showing that the contract is in force and the amount remaining to be paid thereon. Such copy, with statement attached, shall be filed and entered in the same manner as a contract or copy filed and entered for the first time, and the filing officer shall be entitled to a like fee as upon the original filing.

Section 9. (Cancellation of Contract.) After the performance of the condition, upon written demand delivered personally or by registered mail by the buyer or any other person having an interest in the goods, the seller shall execute and deliver to the demandant a statement that the condition in the contract is performed and that the buyer has become the owner of the goods. If for ten days after such demand the seller fails to mail or deliver such a statement of satisfaction, he shall forfeit to the demandant five dollars (\$5.00) and be liable for all damages suffered. Upon presentation of such statement of satisfaction the filing officer shall file the same and note the cancellation of the contract and the date thereof on the margin of the page where the contract has been entered. For filing and entering the statement of satisfaction the filing officer shall be entitled to a fee of (ten cents), except that the Secretary of State shall be entitled to a fee of (fifty cents) for filing and entering a statement of the satisfaction of a contract described in Section 5.

Section 10. (Prohibition of Removal or Sale Without Notice.) Unless the contract otherwise provides, the buyer under a conditional sale contract may, without the consent of the seller, remove the goods from any filing district and sell, mortgage or otherwise dispose of his interest in the goods; but prior to the performance of the condition, no such buyer shall remove the goods from a filing district in which the contract or a copy thereof is filed, except for temporary uses for a period of not more than thirty days, unless

the buyer not less than five days before such removal shall give the seller personally or by registered mail written notice of the place to which the goods are to be removed and the approximate time of such intended removal; nor, prior to the performance of the condition, shall the buyer sell, mortgage or otherwise dispose of his interest in the goods, unless the buyer or the person to whom he is about to sell, mortgage or otherwise dispose of his interest in the goods, shall notify the seller in writing personally or by registered mail of the name and address of the person to whom his interest in the goods is about to be sold, mortgaged or otherwise transferred, not less than five days before such sale, mortgage or other disposal. If any buyer does so remove the goods, or does so sell, mortgage or otherwise dispose of his interest in the goods without such notice, the seller may retake possession of the goods and deal with them as in case of default in payment of part or all of the purchase price. The provisions of this section regarding the removal of goods shall not apply, however, to the goods described in Section 5.

Section 11. (Refiling on Removal.) When, prior to the performance of the condition, the goods are removed by the buyer from a filing district in this state to another filing district in this state in which such contract or a copy thereof is not filed, or are removed from another state into a filing district in this state where such contract or copy is not filed, the reservation of the property in the seller shall be void as to the purchasers, mortgagees, pledgees and creditors described in Section 2, unless the conditional sale contract, or a copy thereof, shall be filed in the filing district to which the goods are removed, within thirty days after the seller has knowledge of the filing district to which the goods have been removed. The provisions of this section shall not apply, however, to the goods described in Section 5. The provisions of Section 8 regarding the duration of the validity of the filing and the necessity for refiling shall apply to contracts or copies which are filed in a filing district other than that where the goods are kept after the sale.

Section 12. (Fraudulent Injury, Concealment, Removal or Sale.) Wherever prior to the performance of the condition the buyer maliciously or with intent to defraud shall injure, destroy or conceal the goods, or remove them to a filing district where the contract or a copy thereof is not filed, without having given the notice required by Section 10, or shall sell, mortgage, or otherwise dispose of such goods under claim of full ownership, he shall be guilty of a crime and upon conviction thereof shall be imprisoned in the county jail for not more than one year or be fined not more than (\$500) or both.

Section 13. (Retaking Possession.) When the buyer under a conditional sale shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to

obtain the property in the goods, or in the performance of any promise, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process.

Section 14. (Notice of Intention to Retake.) Not more than forty nor less than twenty days prior to the retaking, the seller may serve upon the buyer personally or by registered mail a notice of intention to retake the goods on account of the buyer's default. The notice shall state the default and the time of intended retaking, and shall briefly and clearly state what the buyer's rights under this act will be in case the goods are retaken. If the notice is so served and the buyer does not perform, before the day set for retaking, the obligations in which he has made default, the seller may retake the goods and hold them subject to the provisions of Sections 16, 17, 18, 19 and 20 regarding resale, but without any right on the part of the buyer to redeem the goods.

Section 15. (Redemption.) If the seller does not give the notice of intention to retake described in Section 14, he shall retain the goods for ten days after the retaking within the state in which they were located at the time of the retaking, during which time the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred. Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expenses of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer (\$10), and also be liable to him for all damages suffered because of such failure. If the goods are perishable so that retention for ten days as herein prescribed would result in their destruction or substantial injury, the provisions of this section shall not apply, and the seller may resell the goods immediately upon their retaking. The provision of this section requiring the retention of the goods within the state during the period allowed for redemption shall not apply to the goods described in Section 5.

Section 16. (Compulsory Resale by Seller.) If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall sell them at public auction in the state where they were at the time of the

retaking, such sale to be held not more than thirty days after the retaking. The seller shall give to the buyer not less than ten days' written notice of the sale, either personally or by registered mail in a post-paid envelope directed to the buyer at his last known place of business or residence. The seller shall also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least five days before the sale. If at the time of the retaking \$500 or more had been paid on the purchase price, the seller shall also give notice of the sale at least five days before the sale by publication in a newspaper published or having a general circulation within the filing district where the goods are to be sold. The seller may bid for the goods at the resale. If the goods are of the kind described in Section 5, the parties may fix in the conditional sale contract the place where the goods shall be resold.

Section 17. (Resale at Option of Parties.) If the buyer has not paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall not be under a duty to resell the goods as prescribed in Section 16, unless the buyer serves upon the seller, within ten days after the retaking, a written notice delivered personally or by registered mail demanding a resale. If such notice is served, the resale shall take place within thirty days after the service, in the manner, at the place and upon the notice prescribed in Section 16. The seller may voluntarily resell the goods on behalf of the buyer on compliance with the same requirements.

Section 18. (Rights of Parties Where There is no Resale.) Where there is no resale, the seller may retain the goods as his own property without obligation to account to the buyer except as provided in Section 23, and the buyer shall be discharged of all obligation.

Section 19. (Proceeds of Resale.) The proceeds of the resale shall be applied (1) to the payment of the expenses thereof, (2) to the payment of the expenses of retaking, keeping and storing the goods, (3) to the satisfaction of the balance due on the purchase price. Any sum remaining after the satisfaction of such claims shall be paid to the buyer.

Section 20. (Deficiency on Resale.) If the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer.

Section 21. (Action for Price.) The seller may sue for the whole or any installment of the purchase price as the same shall become due under the conditional sale.

Section 22. (Election of Remedies.) After the retaking of possession as provided in Section 13 the buyer shall be liable for the price only after a resale and only to the extent provided in Section

20. Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in Section 13. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer.

Section 23. (Recovery of Part Payments.) If the seller fails to comply with the provisions of Sections 15, 16, 17, 18 and 19 after retaking the goods, the buyer may recover from the seller all payments which have been made under the contract, with interest.

Section 24. (Waiver of Statutory Protection.) No act or agreement of the buyer before or at the time of the making of the contract, nor any agreement or statement by the buyer in such contract, shall constitute a valid waiver of the provisions of Sections 15, 16, 17, 18 and 19.

Section 25. (Additional Rights of Buyer.) The buyer under a conditional sale shall have the right when not in default to retain possession of the goods, and he shall also have the right to acquire the property in the goods on the performance of the conditions of the contract. The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether the property in the goods has passed to the buyer at the time of such breach or not.

Section 26. (Loss and Increase.) After the delivery of the goods to the buyer and prior to the retaking of them by the seller, the risk of injury and loss shall rest upon the buyer. The increase of goods sold under a conditional sale shall be subject to the same conditions as the original goods.

Section 27. (Act Prospective Only.) This act shall not apply to conditional sales made prior to the time when it takes effect.

Section 28. (Rules for Cases not Provided for.) In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to conditional sales.

Section 29. (Uniformity of Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 30. (Title of Act.) This act may be cited as the Uniform Conditional Sales Act.

Section 31. (Inconsistent Laws Repealed.) (Here repeal all existing acts in the field of conditional sales.) But the laws repealed by this section shall apply to all conditional sales made prior to the time when this act takes effect.

Section 32. This act shall take effect.....

THE LEGALITY OF CORPORATE VOTING TRUSTS AND POOLING AGREEMENTS.

The inclination of the early authorities was to condemn all attempts to tie up a majority of the stock of a corporation by a surrender on the part of stockholders of their voting power, and both voting trusts and pooling agreements were frowned upon as illegal.¹

The tendency of rules of law, however, is to follow economic and industrial necessities. This is especially true in the law of private corporations, and to the credit of the courts, in general they have responded in an elastic and willing manner so as to adjust corporate conceptions to economic and social facts and developments.² Accordingly, in the course of time, the courts came to recognize the desirability of sanctioning voting trusts and pooling agreements whereby the control of the corporation might be secured for the support of a continuous policy of management, or for the development of a sound method of administration of corporate affairs, or for the successful working out of a reorganization plan.

For example, suppose a majority of the stockholders of a corporation desire to work in harmony in order to establish and develop a certain continuing corporate policy. Such a result might be achieved, perhaps, by an agreement between stockholders to vote together. Or, better still, it might be achieved through an agreement by which proxies are given to certain trustees with power to vote the proxies as they may be directed or may determine. Or, best of all, through an agreement by which the legal title to the stock is transferred to the trustees with power to vote thereon.³ When the stockholders, or a portion of them, transfer their shares of stock to the voting trustees, the voting trustees acquire the legal title to the stock and the right to vote the stock,

¹Two typical cases are *Bostwick v. Chapman* (1890) 60 Conn. 553, 24 Atl. 32 (Shepaug Voting Trust Cases); *Harvey v. Linville Improvement Co.* (1896) 118 N. C. 693, 24 S. E. 489. In the last cited case, Clark, J., a distinguished jurist, said, at p. 699: "In short all agreements and devices by which stockholders surrender their voting powers are invalid. 5 Thompson Corporations, Sec. 6604. The power to vote is inherently annexed to and inseparable from the real ownership of each share, and can only be delegated by proxy with power of revocation." *Griffith v. Jewett* (1886) 15 Wkly. Law Bul. (Ohio) 419; also, paper by Ex-Judge Simeon E. Baldwin 1 Yale Law Journal, 1, *accord*.

²See, *Piercing the Veil of Corporate Entity*, 12 Columbia Law Rev. 496, 517-518.

³Clark, *Corporations* (3rd ed.) 600.

but the stockholders retain the other incidents of beneficial ownership of the stock, and, in return for their stock, trust certificates are given to them, which certificates are ordinarily transferable, just like stock certificates, subject, however, to the terms and conditions of the voting trust agreement.

Again, let us suppose a case where a corporation has fallen into financial straits and the bondholders or their committee are in a position to compel a foreclosure sale. This may occur in cases even where the corporation is solvent but is unable to maintain its interest payments. It stands to reason that the bondholders will not consent to a reorganization of the corporation (and refrain from foreclosure) unless they are given some definite assurance that, in the immediate future, careful management and proper voting control will be insured. The security holders are vitally interested in seeing that a sound, logical and continuing corporate policy will be adopted, which will insure and protect their safety. In order to work out the reorganization of the corporation, it is necessary also to give assurance to the bondholders that men of financial standing and high integrity are to be in charge of the corporate enterprise for the initial period in the future. Under these circumstances, it is clear that the use of the voting trust is most desirable, until such time, at least, when the theoretical security of the bondholders has become actual security. Besides this, the financial interests which undertake the work of reorganization are also interested in seeing that a suitable management is assured in the reorganization of the corporation, since the bankers' own reputations are involved. An unsuccessful reorganization would injure the standing of the bankers. It follows that financial interests would be unwilling to undertake the financing of the work of reorganization unless the continuity and integrity of the control are assured, and this can be achieved most readily and simply through the simple device of the corporate voting trust.

The courts, bearing in mind these practical considerations, had gradually come, for the most part, to sustain the legality of the voting trust agreement, and by the year 1905 or thereabouts, the decided weight of legal authority had come to recognize that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its beneficial ownership.⁴

⁴*Smith v. San Francisco, etc. Ry.* (1897) 115 Cal. 584, 47 Pac. 582; *Brightman v. Bates* (1900) 175 Mass. 105, 55 N. E. 809; *Boyer v. Nesbitt* (1910) 227 Pa. 398, 76 Atl. 103. In these cases the authorities generally are collected and adequately summarized.

In some jurisdictions the legality of the voting trust had even obtained statutory recognition. Thus, in New York, in 1892 and 1901, the legislature enacted the following statute, which is now Section 25 of the General Corporation Law:⁵

"A stockholder may, by agreement in writing, transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; every other stockholder, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; the certificates of stock so transferred shall be surrendered and canceled and certificates therefor issued to such transferee or transferees in which it shall appear that they are issued pursuant to such agreement and in the entry of such transferee or transferees as owners of such stock in the proper books of said corporation that fact shall also be noted and thereupon he or they may vote upon the stock so transferred during the time in such agreement specified; a duplicate of every such agreement shall be filed in the office of the corporation where its principal business is transacted and be open to the inspection of any stockholder, daily, during business hours."

In Maryland, a similar statute was enacted in 1908.⁶

In 1900, Chief Justice Holmes of Massachusetts, now Mr. Justice Holmes, said:⁷

"We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it."

In the same year, 1900, the New Jersey Court of Chancery said:⁸

⁵Laws of 1892, c. 687, § 20; Laws of 1901, c. 355, § 1, (now Gen. Corp. Law, § 25).

⁶Md. Laws of 1908, c. 240.

⁷Brightman v. Bates, *supra*, footnote 4, at p. 111. See also, Elger v. Blyle, (1910) 69 Misc. 273, 126 N. Y. Supp. 946, a valuable opinion by the late Justice Bischoff.

⁸Chapman v. Bates (1900) 61 N. J. Eq. 658, 666-667, 47 Atl. 638; *cf.*, Warren v. Pim (1904) 66 N. J. Eq. 353, 59 Atl. 773 (in this case the court was divided seven to six, and it is submitted that the dissenting opinion by Swayze, J., is the sound one).

"There is no statutory provision, nor can we perceive any reason offensive to public policy, preventing a stockholder from giving another powers over, or rights in, his shares in a corporation to the same extent that he might give in any property."

In 1910, the Supreme Court of Virginia, in commenting upon the cases which discuss the validity of voting trusts and pooling agreements, said:⁹

"In considering the cases, however, and the text-writers who have commented upon them, it is impossible not to be impressed with *the change of opinion which has taken place with respect to the true nature of such contracts*. In the early stages of the development of this idea there was a strong sentiment against them which found expression in the opinions of judges and in the not always temperate language of distinguished commentators upon the law; *but experience has demonstrated their usefulness, and the hostility evinced toward them has by degrees diminished.*"

In the years 1912-13, as they now appear in their proper perspective, a crusade began against the use of the voting trust or pooling agreement. The Pujo Committee of 1913, in its report to the House of Representatives, severely condemned voting trusts, and submitted that they should be regarded as illegal *per se*, irrespective of their purposes, objects, or intentions. The committee took the view of the early decisions, declaring broadly that the power to vote should be deemed inseparable from the beneficial ownership of the stock and that any agreement or device by which the stockholders combined to place the voting power of their shares of the stock in other persons, *e. g.*, voting trustees, is illegal and against sound public policy. It should be remarked that no evidence had been introduced *pro* and *con* before the committee, for the purpose of determining whether, in general, voting trusts have been a benefit or a detriment, and whether voting trusts whose propriety and just purpose appear should be condemned.¹⁰

⁹Carnegie Trust Co. v. Security Life Ins. Co. (1910) 111 Va. 1, 20, 68 S. E. 412. The italics are ours.

¹⁰Cushing, Voting Trusts, 23 (a valuable treatise).

Mr. Samuel Untermyer, the counsel for the committee, at about the same time, condemned voting trusts in vivid language.¹¹

This agitation was not without its effect upon the courts, and the decisions reflect its effect and consequences. At least two courts have adopted a point of view, as a result, which is unprogressive and reactionary, although it may reflect the popular whim and caprice of the passing moment.

In *Luthy v. Ream*,¹² the Supreme Court of Illinois, in 1915, had occasion to consider the validity of a voting trust of stock of the Peru Plow & Wheel Company, a corporation of the State of Illinois. The effect of the voting trust agreement, entered into by the majority of the stockholders of the company, was to place the legal title of the majority of the stock in one Ream, as voting trustee, who was given the power to vote the stock for a term of ten years upon all questions and at every meeting of the stockholders, according to his discretion. It was provided that, at all elections of directors of the company, the voting trustee should nominate three directors to be voted for at such election, and should vote all of the stock held by him as a unit for each and all of the directors so nominated by him. Some time subsequently, some of the stockholders sold their shares, and their vendee presented the trust certificate for the stock and demanded that a stock certificate should be issued for the shares of stock represented thereby. The corporation refused to issue such stock certificate, stating that the shares of stock were included in the trust agreement, and that it could not and would not issue a new stock certificate to the vendee for that reason. Whereupon, the vendee notified the corporation that, as owner of the shares in question, he withdrew them from the trust agreement and would no longer be bound thereby, and demanded that a stock certificate be issued to him free from any restraint, obligation or condition under such trust agreement.

It should be further noted that, after the sale of the shares in question, Ream, as voting trustee, no longer represented a majority of the stock, but only a minority.

The question was thus squarely presented to the court as to

¹¹Untermyer, A Legislative Program, 25. Since then, Mr. Untermyer has also condemned what he terms "The vice of proxy voting," and suggests "the abolition of proxy voting." Untermyer, *The Lawyer-Citizen—His Enlarging Responsibilities* (a paper read at the annual meeting of the Commercial Law League, July 27, 1916).

¹²(1915) 270 Ill. 170, 110 N. E. 373.

the legal validity of the voting trust agreement and the right of a stockholder, who was a party thereto, to withdraw therefrom within the time specified therein.

The Supreme Court of Illinois had previously held in several cases that it was legitimate and legal for the owners of a majority of the stock of a corporation to combine for the purpose of controlling the corporation.¹³ In this Luthy case, however, the court held that the voting trust agreement was illegal and void, and that the holder of the voting trust certificate must be allowed to revoke the voting trust agreement, so far as he is concerned, at any time. This is a return to the point of view of the early decisions. It is a self-styled "progressive" point of view. It may be a popular point of view, but it is unsound logically, contrary to business needs and demands, and therefore, in truth, a reactionary and unprogressive point of view. The court's main argument was that it is unsound public policy for stockholders to be permitted to divest themselves personally of the rights to vote for a term of years and to confer the right to vote upon their trustees. Quoting from the opinion:¹⁴

"The voting power of the stock is absolutely separated from its ownership for a term of years, so that the real owners of the property are during that time entirely divested of its management and control or of any participation therein. Our law contemplates that corporations shall be controlled by a majority of the stockholders acting through directors elected by them in person or by proxy, and it has been held that a by-law of a corporation which authorizes bondholders to vote for directors at stockholders' meetings is in violation of both the constitutional and statutory provisions requiring directors to be elected by a majority of the shares of stock of the corporation. (*Durkee v. People*, 155 Ill. 354.) *The power to vote for directors can be exercised only by stockholders in person or by proxy, and they cannot be deprived or deprive themselves of this power. Stockholders cannot evade the duty imposed upon them by law of using their power as stockholders for the welfare of the corporation and the general interest of its stockholders. A stockholder may refuse to exercise his right to vote and*

¹³*Faulds v. Yates* (1870) 57 Ill. 416; *Venner v. Chicago City Ry.* (1913) 258 Ill. 523, 101 N. E. 949.

¹⁴*Luthy v. Ream*, *supra*, footnote 12, at pp. 177-178, 180. The italics are ours.

participate in stockholders' meetings, but he cannot deprive himself of the power to do so.

* * * * *

"A stockholder may ordinarily withdraw from a combination to control the majority of the stock of a corporation and a contract not to transfer his shares to the opposition or vote against the combination, although it is expressly agreed that the contract shall be irrevocable."

This is an argument which might very properly be addressed to a legislative tribunal, but which has no place in a court of law, and in particular, it has no place in a court which had hitherto held that stockholders have a common-law right to vote by proxy, even in the absence of statutory authorization.¹⁵

The Illinois court cited several early cases, including the early Shepaug Voting Trust Cases in Connecticut.¹⁶ It then reached the following conclusion:¹⁷

"The principle to be deduced from these cases is that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock has a right to believe that the corporation will, and to insist that it shall, be managed by the majority; *that the power to vote is inherently attached to and inseparable from the real ownership of each share, and can only be delegated by proxy, with power of revocation*; that each stockholder must be free to cast his vote, whether by himself or by proxy, for the best interest of the corporation, and that each stockholder has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interest of all the stockholders, untrammelled by dictation, and *unfettered by the obligation of any contract*."

The Illinois court, furthermore, expressly repudiated the sound decision of the Supreme Court of California in *Smith v. San Francisco & North Pacific Railway Co.*,¹⁸ in which case it was held that an agreement by several purchasers of stock in

¹⁵People *ex rel.* Chritzman *v.* Crossley (1873) 69 Ill. 195.

¹⁶Bostwick *v.* Chapman, *supra*, footnote 1.

¹⁷Luthy *v.* Ream, *supra*, footnote 12, at p. 181. The italics are ours.

¹⁸*Supra*, footnote 4.

a corporation to vote it as a unit for five years, in accordance with the decision of the majority, is binding upon the parties and irrevocable. It also disapproved the decision of the Supreme Court of Virginia in *Carnegie Trust Co. v. Security Life Insurance Co. of America*,¹⁹ in which case it was held that an agreement among stockholders to place their stock in the hands of voting trustees for twenty-five years to enable the trustees to manage the corporation, constitutes a valid trust. The decision of the Supreme Court of Illinois in the Luthy case marks a reversal of the court's own policy as indicated in its earlier decisions, although the court professed to be able to distinguish the earlier Illinois cases. The essence of the holding seems to be that the court believes that the power to vote stock is annexed to and inseparable from the beneficial ownership of each share of stock, and can be delegated only by revocable proxy. In fact, the language of the Supreme Court of Illinois, above quoted, is identical (though not quoted) with that used in an early decision in North Carolina.²⁰

In the next year, 1916, a proposed plan of reorganization of the St. Louis & San Francisco Railroad Co. was presented to the Public Service Commission of the State of Missouri by J. & W. Seligman and Company and Speyer and Company, the reorganization managers. One provision of the plan, termed the "voting trust", under which it was proposed that the stock of the reorganized company should be held and voted by certain trustees for a period of five years, read as follows:²¹

"The preferred and common stock of the New Company (except such number of shares as may be disposed of to qualify directors) shall be vested in the following voting trustees: Frederic W. Allen, George W. Davison, Seward Prosser, Charles H. Sabin, James Speyer, Frederick Strauss and Festus J. Wade.

"In the event of the death or failure or refusal to serve of any person designated as a voting trustee prior to the creation of the voting trust, the vacancy shall be filled by the reorganization managers. The stock shall be held by the voting trustees,

¹⁹*Supra*, footnote 9.

²⁰See language of Clark, J., in *Harvey v. Linville Improvement Co.*, *supra*, footnote 1, with which compare the language of Dunn, J., in *Luthy v. Ream*, *supra*, footnote 12.

²¹*In re St. Louis & S. F. R. R. Reorganization* (1916) 3 Mo. Pub. Ser. Comm. 664, at p. 707.

and their successors, jointly (under a trust agreement prescribing their powers and duties and the method of filling vacancies), for five years, although the voting trustees may, in their discretion, deliver the stock at an earlier date. Until delivery of stock is made by the voting trustees, they shall issue certificates of beneficial interest entitling the registered holders to receive, at the time therein provided, stock certificates for the number of shares therein stated, on payment of any taxes in connection with the surrender of voting trust certificates and the transfer and delivery of stock certificates, and in the meanwhile to receive payments equal to the dividends collected by the voting trustees upon the number of shares therein stated, which shares, however, with the unrestricted voting power thereon, shall be vested in the voting trustees until the stock shall be delivered, as provided in the trust agreement and in the voting trust certificates issued thereunder."

The reason for making this voting trust scheme a part of the plan of reorganization was stated by one of the reorganization managers, as follows:²²

"Q. What special reasons were there for a desire on the part of the present bondholders to place the stock in a voting trust?

"A. The refunding bondholders and general lien bondholders, both, naturally felt that they should have a voice in the management of the property when they were asked to make sacrifices for the benefit of the stock and for the benefit of the property generally. The refunding 4s had the biggest part of the total bond issue of eighty-five million dollars. They took instead only three-quarters of the principal in the new four per cent bond, the rest being taken as a contingent charge, and the issue of which they were asked to have a part is now raised to \$250,000,000. They felt as they were enlarging the amount of the mortgage and providing for the future capital of this road, that they were making a sacrifice of a fixed interest bearing obligation, in part at least, for a contingent one, and that they should have a voice in the property. The same thing applies with even greater force to the general liens because they were still taking a greater part of their principal in contingencies, contingent charges, so we thought the fairest way to do would be to take two representatives from each of the three important classes of securities, the two bonds and the stock and apportion that stock

²²At p. 708.

representation partly east and partly west as the stock is held partly in the east and partly in the west, and then appoint a seventh man in the manner I have just described.

"It was thought that Mr. Allen (seventh member) would represent in an admirable manner the eastern part of his own firm and eastern investors on the one hand and in a measure also the west."

It thus appears that four of the seven trustees named were selected to represent the bondholders, two to represent the stockholders, and one to be "regarded as a sort of neutral". Bearing in mind that the bondholders were vitally interested, because of the sacrifices which they were making for the benefit of the railroad property, and for the general good, it would seem that the reorganization plan was just and reasonable.

The Public Service Commission of Missouri, however, relying upon the early Shepaug Voting Trust Cases,²³ held "that the voting trust provided for in the plan of reorganization is against the public policy of this State."²⁴ Accordingly, it was rejected as invalid and void. Subsequently, the personnel of the trustees was changed, and an application was made to the commission for a rehearing and re-consideration. The commission stated that the change of trustees did not relieve the voting trust of its objectionable features, saying:²⁵

"The serious objection to the voting trust feature of the original plan of reorganization was that it placed the selection of the voting trustees, and consequently the election of the board of directors and the management and control of the company, in the hands of the bondholders instead of the stockholders, as provided by the Constitution and law of this State. The modified plan now considered proposes the substitution of the two names of voting trustees in lieu of two named in the original plan, but makes no change whatever as to the method of the selection of the trustees. It is apparent that a change of trustees does not relieve the voting trust of the objectionable feature to which attention was called in the former opinion. The Commission did not object to the personnel of the trustees first named, but rather to their selection by the bondholders, and as to that feature no change has been made in the plan as modified."

²³Bostwick v. Chapman, *supra*, footnote 1.

²⁴At p. 712.

²⁵*In re St. Louis & S. F. R. R. Reorganization*, *supra*, footnote 21, Supplemental Report of the Commission, at pp. 720-721.

The commission, accordingly, again disapproved the voting trust provision submitted in the plan of reorganization.

It thus appears that the agitation and crusade of the years 1912-13 were not without their effect upon the courts. The Supreme Court of the State of Illinois, we find, practically reversed itself, and we find the Public Service Commission of the State of Missouri taking a similar positive and unqualified position in opposition to the validity of the voting trust or pooling agreement. This attitude was taken in spite of the fact that the federal court for the southern district of New York, in working out a dissolution plan of the New Haven Railroad, recently created voting trusts consisting of three sets of trustees, each consisting of five members, a circumstance of much significance, since the voting trusts were created by the express mandate of the federal judiciary.

On sound principle, it is submitted that there is nothing about voting trusts which should cause courts to hold them illegal *per se*. It is submitted, on the contrary, that each and every argument urged against the validity of voting trusts is specious.

It has been urged that each holder of shares is entitled to the personal judgment and to the personal vote of all the shares. This is the argument of the Shepaug Voting Trust Cases, adopted recently, as we have seen, by the Supreme Court of Illinois and by the Public Service Commission of Missouri, and approved by the courts of North Carolina. Mr. Untermyer takes the same position.²⁶ From a practical standpoint, this argument amounts to nothing, because of the huge size of modern corporations. Is it feasible to hold a mass meeting of ten thousand stockholders? Is it practicable to hold a mass meeting of the ninety thousand stockholders of the Pennsylvania Railroad Company? Is it possible to obtain an army cantonment wherein to assemble the legions who constitute the stockholders of the United States Steel Corporation? This very practical consideration nullifies the argument that every stockholder is entitled "to the judgment of each individual stockholder". When it is said that the stockholder of a corporation is entitled to the benefit of the judgment of each and every other stockholder in the management of the corporate affairs, it cannot be meant, moreover, that a stockholder is entitled to hamper in any way the free and honest exercise of the judgment of his fellow-stockholders. Each stockholder may act as he chooses. It follows that the question is whether it is unlawful to contract to do what it is perfectly lawful to do. Why cannot

²⁶See footnote 11, *supra*.

stockholders, consistently with sound public policy, in order to secure a reorganization of their corporation, and the securing of a necessary loan, vest the management of the corporation in hands satisfactory to the banking interests, which lend the money, and for a term commensurate with the loan? Again, why cannot a group of stockholders combine for a term of years and make their union effective by means of the simple device of a voting trust? A trust may be created of any other kind of personal property, and why not, therefore, of shares of stock? It is nothing short of foolish for a court or for a jurist to speak of the "obligation" of stockholders to assemble together at the time of a corporate election. Under modern conditions, this is as unreasonable as it is impossible in many cases. But in spite of these hard, practical considerations, altruistic visions and ideals of stockholders' meetings similar to New England town meetings are still indulged in by some courts and persisted in.

It has also been urged that voting trusts are invalid *per se* because they suspend the power of alienation. There seems little in this objection. In almost every known instance of voting trusts, there is no period when the outright conveyance of the stock may not legally and validly be made.

The Supreme Court of Illinois has urged, following the early cases, that the voting power should not be separated from the stock ownership and argues that, therefore, voting trusts are illegal. In the first place, this argument is based upon an unsound premise, because in the case of most voting trusts, the voting power follows the legal ownership of the stock. The legal title to the stock is in the voting trustees, and they have the power to vote it. In the second place, why cannot a stockholder give another person a power over, or right in, his shares of stock in a corporation in the same way and to the same extent that he might give rights in any other personal property?

It has also been urged that voting trusts are mere "dry trusts" and, therefore, stockholders may revoke them, though they are in form irrevocable. In the case of most voting trusts, however, the trust is an active one. Besides, as suggested by Chief Justice Holmes, "It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases."²⁷ The doctrine as to dry trusts, therefore, does not apply in these cases.

It has also been objected that the voting trust is a method of trying to evade the statutory rule, which usually exists, forbidding the creation of proxies for longer than a certain given term. The

²⁷Brightman v. Bates *supra*, footnote 4, at p. 111.

answer to this contention is very simple. The voting trust is not a mere proxy, but is a change of legal title in and to the stock. It is an outright conveyance of the stock, conditioned upon certain covenants made by the voting trustees and certain duties imposed upon them.

The argument has also been advanced that voting trusts are undemocratic".²⁸ This is the "public policy" argument in another form. It is readily answered. A majority of individual stockholders may be destroyed at any moment, provided that a single interest buys a sufficient amount of stock. The unit of corporate control is the *share of stock*, rather than the *individual stockholder*. A majority means a majority in interest, not in number. Moreover, this objection is met by the terms of most voting trusts, which provide that any other stockholder may participate in the terms, conditions and privileges of the voting trust agreement; and in New York this is expressly provided for in the statute, adopted also in Maryland, which regulates the subject of voting trusts and pooling contracts.

Thus it appears that voting trusts should not be held illegal *per se*. Even a number of the cases which hold particular voting trusts to be invalid, usually recognize the proposition that there may be a valid voting trust.²⁹

It is submitted that, on sound principle, voting trusts and pooling agreements should be upheld as valid and legal, provided that the propriety of their object and the good purpose of their creation affirmatively appear. In other words, the voting trust should not be condemned *per se*. The validity of the trust should be made dependent upon the purposes for which the trust is created, the powers that are conferred, and the propriety of the objects in view. If the pooling, or combining, or trust is designed to carry out a particular corporate policy with a view to promote the best interests of the corporate body of stockholders, the agreement should be upheld as valid. On the other hand, where the voting trust or pooling agreement is created to consummate an unfair or monopolistic purpose, it should be condemned.

Many apparently conflicting decisions are reconcilable under this test and when the purposes of the voting trust or pooling agreement in each particular case are scrutinized carefully. As said in 1912 by the highest court of Vermont:³⁰

²⁸See paper by Ex-Judge Simeon E. Baldwin, 1 Yale Law Journal 1, 15.

²⁹See *Kreissl v. Distilling Co. of Am.* (1900) 61 N. J. Eq. 5, 47 Atl. 471.

³⁰*Thompson-Starrett Co. v. Ellis Granite Co.* (1912) 86 Vt. 282, at p. 289, 84 Atl. 1017. The italics are ours.

"The defendant says that the agreement referred to amounts to a voting trust, and is therefore illegal and void. But this result does not necessarily follow. Such agreements are not illegal *per se*. *Their validity depends upon the purposes they are designed to observe.* Where these purposes are lawful, stockholders may, in the absence of constitutional or statutory restrictions, suspend for a time the right to vote their stock and vest it in others who have a beneficial interest in it or the corporate business,—as corporate creditors or a trustee for them."

And as said by the highest equity court of New Jersey in 1900:³¹

"whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, *must be dependent upon the purposes for which the trust was created, and the powers that were conferred.*"

To summarize. It is unsound to hold that "all agreements and devices by which stockholders surrender their voting powers are invalid." It is unsound to hold that voting trusts are void *per se*, as opposed to good public policy. Such a point of view is surely unprogressive. It ignores business necessities. It disregards economic considerations. It shuts its eyes to business actualities. While it is true that many of the early cases adopted this attitude, it would be most unfortunate for the courts again to swing around to it. That there is some real danger of their doing so, is illustrated by the recent decisions in such powerful jurisdictions as Illinois and Missouri.

The correct rule to adopt is to uphold the legality of the voting trust or pooling agreement, provided the propriety and reasonableness of its object affirmatively appear, and provided that the arrangement itself is honest and equitable. The voting trust, in other words, should not be condemned as void *per se*, but should only be condemned in those instances where the trust or pooling agreement is created and carried out in order to effectuate an improper, unjust, or monopolistic object. The writer submits that in jurisdictions, unlike New York and Maryland, where this subject is not yet regulated by statute, this course is the sound, logical and just one for the courts to adopt.

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³¹Kreissl v. Distilling Co. of Am. *supra*, footnote 29, at p. 14, *per* Magie, Ch. The italics are ours.

THE SHERMAN ACT AND THE WAR.

On April 12, 1917, an indictment was filed in the United States District Court for the Southern District of New York against a number of men, the charge against whom was that they had entered into an unlawful combination in restraint of trade in that they controlled the newspaper print industry. It was charged that the great bulk of the output of newsprint paper in this country was produced by some forty corporations which were members of an association of newsprint manufacturers; that the defendants dominated this association and its member corporations; that they controlled trade and commerce in newsprint paper, restraining competition in securing customers, in quality of paper, in delivery and storage of paper, in terms of credit and various other matters. The indictment, in short, charged many of the typical acts held by the courts to constitute violations of our anti-trust laws.

On November 26, 1917, the case came up before the United States District Court, Judge Julius M. Mayer presiding. Most of the defendants pleaded *nolle contendere*. The plea was accepted by the court on the consent of the government, and the defendants were thereupon fined. Their pleas and their fines are matters of no great importance. But there were at the same time submitted to Judge Mayer a petition and an agreement upon which he made a final decree. In these three documents,—brief, lucid, phrased as simply as if they dealt with familiar and well-tried matter,—will, it is believed, be found a novel and significant contribution to the jurisprudence of this country.

THE AGREEMENT.

The parties to the agreement are Thomas W. Gregory, the Attorney-General of the United States, and the newsprint paper manufacturers. Mr. Gregory makes the contract as trustee on behalf of publishers who use newsprint paper,—which is to say that the attorney-general assumes to act as trustee for all the newspaper publishers of the United States. After reciting the desirability of an adjustment of trade conditions in the newsprint industry, the agreement provides that the newsprint manufacturers will consent to a decree dissolving the Newsprint Manufacturers' Association as an unlawful combination, and it provides for

maximum prices for newsprint paper up to April 1, 1918, and that thereafter (here we come to the essence of the matter)

“the just and reasonable maximum prices and terms of contract for the sale of all or any newsprint paper shall be determined and fixed by the Federal Trade Commission”.

It provides for review of the findings of the commission by the circuit court judges of the second circuit. It provides that the maximum prices and terms of contract so determined shall continue until three months after the end of the war. The newsprint manufacturers agree to offer their newsprint paper for sale in accordance with the maximum prices so fixed.

THE PETITION.

The government's petition alleges the existence of the combination, largely as it is described in the indictment, and prays for a decree that the Newsprint Manufacturers' Association be adjudged an unlawful combination in restraint of trade and dissolved; and that the various member corporations be enjoined from carrying the combination into further effect, but that the member corporations shall not be enjoined from entering into the agreement just described.

In effect, this petition is a bill of complaint in equity in a suit of the United States of America against the individual defendants who had been indicted, the association and its member corporations, brought for the purpose of dissolving the association as a combination in restraint of trade.

THE DECREE.

The decree, entered by consent, adjudges the combination illegal, dissolves it, enjoins any further acts looking toward carrying it into effect, and, continuing, contains the following pregnant clause:

“Nothing herein contained shall prevent the defendants from entering into and performing a certain contract of even date with the Attorney-General of the United States as Trustee, made for the purpose of meeting the emergencies created by existing conditions and by the present state of war in the United States.”

In brief, then, the newsprint case is that of a combination adjudged illegal and dissolved under an arrangement made by the government with the defendants and approved by the court, whereby power is conferred upon the Federal Trade Commission to fix maximum prices.

Are the import and effect of this disposition of the case apparent? Does the reader recognize that in this method of dealing with the newsprint trust the Sherman Act has been harnessed to economic needs; that controlling groups in any line of industry have had the door opened to them for that decent and wholesome co-operative action which to this time has been forbidden them? Let us see the effect of the proceedings of November 26.

The Federal Trade Commission, a body without statutory power to fix prices, whether maximum or minimum, has, by consent of the government and the newsprint industry, had conferred upon it the power to fix the maximum prices of newsprint paper. This power has been acquired by voluntary agreement, stimulated possibly by the fact of an indictment. In making this agreement the attorney-general has acted, not as an officer of the government, but as a self-constituted trustee and guardian for the American newspaper publishers. The agreement has provided for review of the actions of the Federal Trade Commission by the circuit court judges of the second circuit, but if they entertain such review, they will be acting in an extra-judicial capacity,—practically as arbitrators (having, as the writer is informed, consented so to act).

Thus, a number of gentlemen who compose a body called the Federal Trade Commission will be acting extra-officially to fix maximum prices, pursuant to an agreement (approved by the court) between a gentleman (acting extra-officially) who happens to be Attorney-General of the United States, and the manufacturers of newsprint papers; and various other gentlemen who happen to be the circuit court judges will (extra-judicially) have power as arbitrators to review the actions of the Federal Trade Commission.

It will not serve the purpose of, nor is it needful to, this brief essay to enter into a discussion of the cases in which our judges have fought about the meaning, effect and extent of the Sherman Act. The many cross-currents, the conflicting views, the dissents, the confusion, doubt and contradictions on the subject are well known to the Bar. Any lawyer who has read such cases as the

Trans-Missouri Freight Association case,¹ The Joint Traffic Association case,² the Addyston Pipe Line case,³ and the Standard Oil⁴ and Tobacco⁵ cases, and the case of *Dr. Miles Medical Co. v. Park & Sons*,⁶ can, without much of an effort of imagination, picture the ardent arguments which must have occurred in the conference room of the Supreme Court while these cases were in the throes of decision. The language of some of the dissenting opinions gives some indication of the violence of the difference among our Supreme Court Judges on the economic questions involved. For example, in the case of *Miles Medical Company*, the dissenting opinion of that learned jurist, Mr. Justice Holmes, points out that

"the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear".⁷

Considering the effect of interference, he remarks:

"Of course, it is not in the interest of the producer. No one, I judge, cares for that. * * * Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition".⁸

It is interesting to note that following this able dissenting opinion, delivered in 1911, the Standard Oil and Tobacco cases, decided at the same term of court, laid down the famed "rule of reason", with its consequent substantial measure of protection to the producer, whose rights had theretofore been considered as negligible. Whether or not the Supreme Court reversed its earlier rulings in the Standard Oil and Tobacco cases is beside the mark, but one cannot pass them by without reference to Mr. Justice Harlan's colorful dissent in the Tobacco case and his remark that the statement in the prevailing opinion in the Standard Oil

¹*United States v. Trans-Missouri Freight Ass'n.* (1897) 166 U. S. 290, 17 Sup. Ct. 540.

²*United States v. Joint Traffic Ass'n.* (1898) 171 U. S. 505, 19 Sup. Ct. 25.

³*Addyston Pipe & Steel Co. v. United States* (1899) 175 U. S. 211, 20 Sup. Ct. 96.

⁴*Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502.

⁵*United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632.

⁶(1911) 220 U. S. 373, 31 Sup. Ct. 376.

⁷At p. 411.

⁸At pp. 411-412.

case to the effect that that decision was in accordance with previous decisions surprised him

"quite as much as would a statement that black was white or white was black".⁹

These few observations are perhaps interesting as showing how the development of the construction of the anti-trust laws has been a fitting prelude to the newsprint decree. Yet, despite the undoubted effect of economic conditions upon the judgments of the United States Supreme Court, the last word which that tribunal has to the present time spoken on the subject is announced in the case of *Thomsen v. Cayser*¹⁰ wherein the Court says

"that a combination is not excused because it was induced by good motives or produced good results".

Whatever else, then, the cases may announce, the result of the conflict between commerce and the courts, as it is written in the decisions of the United States Supreme Court, seems clearly to be that a combination by controlling factors in a given industry, however laudable in intent and beneficial in operation, comes under the ban of the statute: whether such a combination is made to save its participants from ruin through excessive competition, reasonably to limit output so as to avoid the waste of excessive supply, to co-ordinate trade necessities, or for any other purpose or reasons, the combination is unlawful and those who enter into it run afoul of the criminal law. Co-operative action,—friendly agreement on trade usages or needs,—has thus in many cases been thwarted and stifled, and, in others, the stress of economic conditions has led to secret combinations as to price, output, credit, and so forth, or to resort by subterfuge to sales agencies, trade discounts, rebates, *etc.*

The newsprint decree for the first time, it is believed, offers something approaching a solution for these problems which have so beset all honest groups controlling any branch of commerce. It suggests to them that they confer with the Department of Justice, frankly lay before it their trade necessities, enter into an agreement whereby the co-operative measures they require may be submitted to a federal commission, and whereby such a body may fix maximum prices; for, now that the attorney-general has with the court's approval once taken such a course, the path has been shown to others.

⁹221 U. S., at p. 191.

¹⁰(1917) 243 U. S. 66, at p. 86, 37 Sup. Ct. 353.

Whether the play of competition should be wholly free and unrestrained, whether combinations "in restraint of trade" are at times desirable, whether the government ought itself at times to restrain trade,—these are big questions for the economist. With these questions the writer is not here dealing. Yet, in commenting on the newsprint decree and considering its possibly far-reaching effects, one cannot but note how it voices the tendencies of the time. The Interstate Commerce Commission controls railroad rates, or did when these lines were written; now they are in effect in the hands of a supreme director—restraint of competition in very truth. Thus competition among the railroads is restrained. The President has, by taking over the railroads, given point to the urgent need of combination, concentration and co-ordination. The President, under one of the recent war measures,¹¹ fixed the price of coal last August,—not a restraint merely, but a destruction of price competition. The President has lately recommended legislation to permit combinations in relation to foreign trade. Pooling agreements by the eastern railroads have lately been in force; competition in important food-stuffs is curtailed or forbidden; "maximum prices" and "minimum wages" are on everyone's lips. The catch-word is no longer "competition". The words which now fire the imagination are "co-operation", "co-ordination". And beneath and behind these words lie deep meanings and urgent war needs.

Is it too much, then, to say that to the counsel who prepared the newsprint documents and to the court which signed the newsprint decree belongs the credit of a great piece of constructive work? Legalistic conservatives may decry it. They may object to Mr. Gregory's voluntary trusteeship, to the acquisition of great extra-official powers by the Federal Trade Commission, and to a decree which sanctioned such an arrangement. But during the war, at least, there must be an armistice in the battle of commerce against the Department of Justice and the courts. The newsprint decree flies such a flag of truce. But it does more than that; for, as it is quite in line with a scheme of governmental price-fixing of staple commodities, of governmental control over industry, of enforced co-operation, of an end to competition in large industrial enterprise, so it suggests a practical method whereby the government and the trusts can meet on common ground.

Such schemes are today not only widely pondered and discussed; they have passed from the economist's study to the wide field of actual business life.

¹¹The Lever Act, H. R. 4961, 65th Congress, 1st Session.

The Chamber of Commerce of the United States is deliberating upon recommending extensive price-fixing legislation. Congress is likely to take up the matter at an early date. Should that happen, the newsprint decree suggests an admirable scheme of legislation,—a scheme whereunder the Federal Trade Commission shall have elastic powers with provision for review by the courts. And, while so tremendous a piece of legislation as this goes through its slow period of gestation, the newsprint decree furnishes a means of co-operation and co-ordination between the government and the trusts, and illustrates vividly how court and counsel, alive to the urgent requirements of these thrilling days, have been able to bend to present needs the iron of a statute heretofore rigid and unadaptable to economic growth.

Whether we like it or not, we find that the pressure of war and the growing demands of that vast, self-conscious and magnificently organized power,—labor,—are breaking down individualistic concepts of a government which permits unrestricted competition; we find the government consenting to postpone anti-trust prosecutions; whether or not it suits our political or economic views, we find an increasing governmental supervision over industry, particularly over great industry of interstate and international character,—an increasing demand for combined, concentrated and co-ordinated action in manufacture and trade. The need of supervision, in war time particularly, requires no argument, and the need of the future period of reconstruction is equally plain. The danger, with such currents sweeping through the land, is that government will go too far; that it will attempt to fix prices and regulate production of everything from steel bars to bird cages, from coal to candy. Trade in specialized articles cannot, it is believed, be successfully controlled. Raw products, staple commodities or necessities,—these are things over which the government must, and, in view of the world war, will increasingly extend its powerful arm. The newsprint decree has the extraordinary merit of affording a simple and workable method of accomplishing such results at once in relation to the great branches of trade and manufacture; and of doing so in a sensible way, guided by the “rule of reason”. While it does not afford complete relief, since it could not have been made excepting through the consent of the newsprint industry, yet the decree is for practical purposes adequate, since it opens the door for the controlling interests in any line of industry to agree on the fixing of a fair maximum price with governmental sanction.

The discussion of the newsprint decree would be incomplete without a consideration of the question of the court's power to make it. That power, it is believed, is found amply in the supervisory jurisdiction of the federal court over the details and manner of dissolution of illegal combinations.

Thus, it was declared in *United States v. Union Pacific R. R.*¹² that the object of proceedings of this character is to decree, "by as effectual means as a court may, the end of such unlawful combinations". In line with this statement of the Supreme Court, various methods for working out the details of dissolution have been adopted by the courts. In the Tobacco and Standard Oil cases¹³ the Supreme Court remanded the causes to the circuit court, instructing it to formulate and carry out the details of dissolution; from which it will be observed that the courts have not contented themselves simply with an injunction order, but have gone much further in order to make effective their decrees of dissolution.

In the newsprint case the court found that the "most effectual means" for dissolving the combination was to let the Federal Trade Commission fix maximum prices. In permitting this body to act in this capacity, the court, instead of trying itself to work out a purely administrative duty, selected for that purpose a body having ample administrative offices and equipment for that very purpose. Novel as is the disposition of the case, the court's power to take the step in order to render its decree effectual can no more be doubted than its wisdom in delegating to an administrative body a purely administrative function.

The Federal Trade Commission was formed, as the statute creating it shows, for the purpose of creating an administrative body clothed with powers to investigate combinations so as to prevent their continuance and so as to make the anti-trust laws effective. In the case of *United States v. Corn Products Refining Company*,¹⁴ Judge Learned Hand referred the details of dissolution to the Federal Trade Commission as master in chancery instructing it to present a plan for dissolution to the district court. He pointed out that

"in all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone".¹⁵

¹²(1913) 226 U. S. 470, at p. 477, 33 Sup. Ct. 162.

¹³*Supra*, footnotes 4, 5.

¹⁴(D. C. 1916) 234 Fed. 964.

¹⁵At p. 1018.

Judge Hand's action was taken pursuant to the act creating the Federal Trade Commission, which authorizes the court in suits brought by the government under the anti-trust laws to

"refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree".¹⁶

Judge Rose, in the District of Maryland, in a recent case, found an unlawful combination to exist but refused to dissolve it, saying:

"The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. * * * * *

The creative faculty of equity still continues to be energetic and productive".¹⁷

It was in the exercise of these creative faculties ever adaptable to the varied needs of life that the court had full jurisdiction to make the newsprint decree, and an instance of a somewhat similar theory of action is found in the Equity Rules in the United States District Court for the Southern District of New York¹⁸ providing that in patent causes the court will, upon consent of the parties, appoint an expert as an assessor, such assessor to sit with the judge in the hearing of the evidence and assist the court in its deliberations.

In other words then, just as the court has, in the newsprint case, called in an expert body, so the court in patent cases calls in an expert body to advise it, rather than to decide haphazard, subjected as it is to the limitations which surround a court.

Since the court has power to appoint the Federal Trade Commission as special master even without the consent of a defendant, *a fortiori*, the court's power to authorize the Federal Trade Commission to fix maximum prices when that authorization is consented to by the defendants, as in the newsprint case, cannot be questioned.

Several years ago Judge Walter C. Noyes, sitting in the circuit court of appeals in the second circuit, explaining the constantly

¹⁶38 Stat. 722, 8 U. S. Comp. Stat. (1916) § 8836g.

¹⁷United States v. American Can Co. (D. C. 1916) 234 Fed. 1019, at pp. 1021, 1022.

¹⁸Rule 6.

increasing scope of jurisdiction of the federal courts in equity insolvency suits, remarked:

"Thus is illustrated anew the vainness of saying what courts of equity *cannot* do."¹⁹

These words are appropriate to the newsprint decree. Heretofore details of dissolution have been prepared by counsel for the government and the defendants, and have then been submitted to the court. In this respect the newsprint decree is an innovation, for here the court has delegated the crucial matter of maximum price to the Federal Trade Commission. The advantages of this plan over former methods are too obvious to require discussion. Courts are judicial, not economic bodies. Judges have neither the time nor the administrative and clerical staffs with which to deal with the purely business questions of details and manner of dissolution. Moreover, the newsprint decree has the advantage of elasticity. Prices can be changed from time to time by the Federal Trade Commission, and, above all, there is a constant supervisory arm over the newsprint trade. In other cases, once the final decree of dissolution was made, the court ceased to follow the subsequent history of business conduct of the defendants, for the court had no agency to carry out such a program, and it may, therefore, be questioned whether such decrees have been effective. The newsprint decree, on the contrary, causes an unceasing supervision over the newsprint trade so that there will be a constant protection of the interests of the public.

It is, therefore, a most "effectual means" for dissolving a trust and instances not only a valid but also a wise and far-seeing use of those broad powers of chancery to exert which courts of equity came into being.

While it is true that the proceedings in the newsprint case are on their face a war measure merely (for the powers of the Federal Trade Commission over prices of newsprint cease three months after the end of the war), and while the case can be regarded as a precedent for action by the attorney-general only, perhaps, where a combination otherwise illegal is to be dealt with by voluntary arrangement, there seems to be no good reason why the same plan should not afford a basis for like judicial action in other branches of commerce, and for a scheme of legislation hereafter.

NEW YORK CITY.

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¹⁹Pennsylvania Steel Co. v. New York City Ry. (C. C. A. 1912) 198 Fed. 721, at p. 737.

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NOTES.

CONSTITUTIONALITY OF RACE SEGREGATION.—While the due process and equal protection clauses of the Fourteenth Amendment make no mention of race, color or previous condition of servitude, it is familiar history that the animating purpose of the Amendment was the protection of the negro against unwarranted restraints and discriminations imposed by the states.¹ It may be said with confidence, there-

¹See Mr. Justice Miller in *Slaughter-House Cases* (1873) 83 U. S. 36, 71-72, and Mr. Justice Strong in *Strauder v. West Virginia* (1879) 100 U. S. 303, 306-308.

fore, that a restriction of the area in which negroes may have their homes is obnoxious to that vaporous, but none the less vital, essence known as the "spirit" of the Fourteenth Amendment. It is undeniable also that such a restriction is within the strict letter of the constitutional prohibition. For if, in a designated area, a white man may purchase a home to live in, and a negro may not, the negro is discriminated against and is thus denied the equality of legal treatment which the equal protection clause by its terms implies. This discrimination against the negro does not evaporate because, in some other designated area, a negro may buy a home to live in, and a white man may not. In this area the white man is discriminated against in favor of the negro. Such discrimination also comes within the letter of the constitutional prohibition. In addition to these localized discriminations against blacks and whites respectively, a segregation law imposes against all owners of residence property certain restraints on alienation. In some areas owners may sell only for white occupancy; in others, only for black. This denial of freedom to contract is a taking of liberty and also of property.² Unless therefore, such restriction can be justified as a proper exercise of the police power, it is a taking without due process of law.

The proponents of the constitutionality of segregation laws take two positions: first, that they involve no discrimination;³ and secondly, that the discrimination which they involve is justified by the police power.⁴ The first point finds some apparent support in the opinion of Mr. Justice Brown in *Plessy v. Ferguson*⁵ which sustained a state statute compelling railroads to provide "separate but equal" accommodations for the white and colored races. But the support is only apparent. The learned justice took the position that if "the enforced separation of the two races stamps the colored race with a badge of inferiority", this "is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."⁶ However correct it may be to blame the negro's defective perceptions for any seeming invidiousness in the operation of a segregation law, the fact that the law is not invidious does not mean that it is not discriminatory. In order to establish discrimination, it is only necessary to show that one class has not the same legal freedom accorded to another. A pinch of common sense is enough to make clear that a segregation ordinance treats one class differently than another. The place where the discrimination impinges may be limited in area. There may be other places where a reverse form of discrimination is imposed. But the cross discriminations in different places do not obliterate the fact of discrimination in both.

It does not follow, however, that because there is discrimination, there is a denial of equal protection of the laws, as that phrase has been interpreted by the Supreme Court. The Court permits difference of treatment provided all in a class are treated alike and provided also the classification is on a reasonable basis.⁷ The crucial question,

²*Allgeyer v. Louisiana* (1897) 165 U. S. 578, 591-592, 17 Sup. Ct. 427; *Holden v. Hardy* (1898) 169 U. S. 366, 391, 18 Sup. Ct. 383.

³16 *Michigan Law Rev.* 109, 110; 27 *Yale Law Journal* 393, 394.

⁴16 *Michigan Law Rev.* 109, 111; 27 *Yale Law Journal* 393, 397.

⁵(1896) 163 U. S. 537, 16 Sup. Ct. 1138.

⁶At p. 551.

⁷*Missouri v. Lewis* (1879) 101 U. S. 22; *Barbier v. Connolly* (1885) 113 U. S. 27, 5 Sup. Ct. 357.

therefore, in determining the constitutionality of residential race segregation is whether the color line furnishes a reasonable basis of classification. The same consideration determines whether it is a proper exercise of the police power, and therefore due process of law, to restrain owners of land from alienating their parcels for white or colored occupancy depending respectively on the dominant population of the block in which the parcel lies. If it is reasonable to compel the races to dwell permanently apart, it is reasonable to restrict the power of alienation to effectuate this result. Thus both the due process and the equal protection issues depend for their solution on this same question of reasonableness.

It is to be noted, however, that, in settling the due-process dispute, the fact of race discrimination assumes importance, not as an objection to an otherwise valid statute, but as an alleged justification for a statute otherwise invalid. The friends of the restraint on alienation must establish that the discrimination between the races is a positive good and not merely an insignificant evil. For, unless the statute will keep negroes from moving to the blocks where their neighbors will be preponderantly white, and unless this is a public benefit, the justification for the otherwise invalid restriction fails. Statutes making arrangements for the conduct of the public schools,⁸ or regulating the operations of public carriers,⁹ or amending the charters of corporations¹⁰ have no such initial invalidity to overcome as has a statute limiting the freedom of an owner to sell his land.

Supporters of the constitutionality of segregation laws have cited with seeming confidence the oft repeated *formulae* with respect to the criteria of reasonableness, to the weight to be given to legislative determinations of the issue, and to the duty of the courts not to declare a statute unconstitutional unless its unconstitutionality is free from doubt.¹¹ In spite of these rubrical guides, statutes are frequently declared unconstitutional, and by a bare majority of the court. These canons of judicial review are honored so frequently in the breach as well as in the observance, that they aid but little in the judicial settlement of constitutional issues. Moreover, in view of the background and underlying purpose of the Civil War Amendments, the legislative determination that there shall be discrimination on the basis of color is entitled to little more than a minimum of respect by the Supreme Court.¹² The ascription of any considerable weight to such legislative judgment would furnish a useful premise from which to deduce sanction for a new nullification of the Constitution.

The problem of reasonableness must be approached concretely and realistically. A basis of classification may be reasonable for one purpose and unreasonable for another.¹³ For this reason the decisions sustaining the propriety of classification on the basis of race for the

⁸People v. Gallagher (1883) 93 N. Y. 438.

⁹Plessy v. Ferguson, *supra*, footnote 5.

¹⁰Berea College v. Kentucky (1908) 211 U. S. 45, 29 Sup. Ct. 33.

¹¹16 Michigan Law Rev. 109, 111; 31 Harvard Law Rev. 475-479.

¹²The same is true of the respect to be paid to the determinations of the courts of southern states sustaining such discrimination.

¹³See Mr. Justice McKenna in *Billings v. Illinois* (1903) 188 U. S. 97, 102-103, 23 Sup. Ct. 272. Compare *American Sugar Refining Co. v. Louisiana* (1900) 179 U. S. 89, 21 Sup. Ct. 43, with *McFarland v. American Sugar Refining Co.* (1916) 241 U. S. 79, 36 Sup. Ct. 498.

imposition of some discriminatory restrictions are not controlling on the question of the propriety of the same basis for other restrictions. It may be reasonable, as it has been held to be, to forbid intermarriage of Caucasians and Africans,¹⁴ to provide severer penalties for bichromatic intimacies out of wedlock than for monochromatic intimacies,¹⁵ to separate the races in schools¹⁶ and public conveyances,¹⁷ and yet be unreasonable to forbid them to live in the same neighborhood. The validity of each discrimination depends upon its particular justifications. The same is true of the validity of a restraint on the alienation of property. It may be proper to forbid the use of property for a saloon¹⁸ or a brickyard,¹⁹ but improper to forbid its use as a dwelling place for a negro or for a white man. And the justification for each restriction or discrimination must be determined by a judgment as to the relation between the burden imposed on individuals and the benefits to the public resulting therefrom.²⁰ The extent of the burden is dependent not only on the material inconveniences which it occasions, but on the legal quality of the interest which it thwarts.²¹

Weighed in such scales, the interest of going to a particular public school or of riding in a particular conveyance is materially and legally less deserving of consideration than is the interest of choosing one's place of abode. Public schools and public conveyances are subject to greater governmental supervision and regulation than is the selection of a home. The establishment of a pale beyond which one must not live, except by migration from the governmental district, is a more serious and more permanent interference with liberty and property than those which result from exclusion from certain schools or certain railway carriages. The hypothesis that other schools and other cars are equal to those forbidden is closer to fact than is any hypothesis that the area reserved for negro dwellings is equal to that designated for the whites. If substantial equality of school and transportation accommodations is denied, there is legal power to compel it or to disregard the prohibition against entering the forbidden spot.²² On the other hand, if exclusion of blacks from white areas is sustained as constitutional, no *mandamus* can alter the character of the neigh-

¹⁴State v. Gibson (1871) 36 Ind. 389.

¹⁵Pace v. Alabama (1882) 106 U. S. 583, 1 Sup. Ct. 637.

¹⁶Lehew v. Brummell (1891) 103 Mo. 546, 15 S. W. 765, and other cases cited in Plessy v. Ferguson, *supra*, footnote 5.

¹⁷Plessy v. Ferguson, *supra*, footnote 5.

¹⁸State v. Ball (1909) 19 N. D. 782, 123 N. W. 826, cited in 27 Yale Law Journal 395, n. 15, in the course of a discussion advocating the constitutionality of laws separating the races in residence areas.

¹⁹Hadacheck v. Los Angeles (1915) 239 U. S. 394, 36 Sup. Ct. 143.

²⁰See Lawton v. Steele (1894) 152 U. S. 133, at p. 140, 14 Sup. Ct. 499; Noble State Bank v. Haskell (1911) 219 U. S. 104, at p. 110, 31 Sup. Ct. 186; Eubank v. City of Richmond (1912) 226 U. S. 137, at pp. 143-144, 33 Sup. Ct. 76; Rideout v. Knox (1889) 148 Mass. 368, at pp. 372-373, 19 N. E. 390; Commonwealth v. Strauss (1906) 191 Mass. 545, at p. 553, 78 N. E. 136; and Mr. Justice McKenna's dissenting opinion in Adair v. United States (1908) 208 U. S. 161, at p. 189, 28 Sup. Ct. 277.

²¹See 17 Columbia Law Rev. 114, 119-120, n. 6. See also Crowley v. Christensen (1890) 137 U. S. 86, 11 Sup. Ct. 13; Public Clearing House v. Coyne (1904) 194 U. S. 497, 24 Sup. Ct. 789.

²²McCabe v. Atchison, T. & S. F. Ry. (1914) 235 U. S. 151, 35 Sup. Ct. 69.

borhood remaining for occupancy by the blacks. Housing accommodations are not, like schools and transportation, provided by municipal or public-service corporations. In plain fact, a negro who is eager and financially able to live in a white neighborhood, but is forbidden by law to do so, is denied the possibility of obtaining accommodations equal to those available to the white man. Since the protection accorded by the Fourteenth Amendment is personal,²³ the constitutional rights of the individual negro are unaffected by the fact that the undesirability of negro neighborhoods is attributable to the shiftlessness and uncleanness of the fellow-members of his race. In any candid view of the actual situation, the exclusion of negroes from all blocks in which whites predominate is a more grievous infringement of the requirement of equality than is the failure to provide parlor and dining cars for negroes and the exclusion of negroes from those open to whites. And such discrimination in respect to the luxuries of railway travel is declared to be inconsistent with the requirements of the Constitution.²⁴

These considerations differentiate the constitutional issue raised by an ordinance discriminating between the races in respect to freedom to choose their abode, from the issue in the decisions in which race discrimination has been sustained.²⁵ And in *Buchanan v. Warley* (1917) 38 Sup. Ct. 16,²⁶ the Supreme Court found the considerations sufficient to distinguish the precedents and to require it to declare invalid a municipal ordinance forbidding the sale of property for residence purposes where the intending dweller was of a different race from that of the majority in the block in which the parcel lies.²⁷

Though the opinion has the aroma of race discrimination and the equal protection clause, it treats the issue as one concerned primarily with the due process clause and the rights of owners of real estate. This emphasis was facilitated by the fact that the cause originated in a bill brought by a white man against a negro for specific performance of a contract to purchase a residence for negro occupancy in a white block. In dealing with the contention that the ordinance would "promote the public peace by preventing race conflicts", the Court was content with the self-proving answer that "this aim cannot be accomplished by laws or ordinances which deny rights created or

²³*Ibid.*

²⁴*Ibid.*

²⁵See cases cited, *supra*, footnotes 5, 8, 10, 14 and 16.

²⁶The decision of the Court was unanimous, but the fact that it was not reached without difficulty may be inferred from the reporter's statement that the case was first argued in April, 1916, reargued in April, 1917, and not decided until November, 1917.

²⁷The ordinance, by providing that nothing contained therein "shall affect the location of residences, places of abode or places of assembly made previous to its approval", (38 Sup. Ct., at p. 17), avoided the difficulty which induced the supreme court of Maryland to declare a Baltimore segregation ordinance invalid. *State v. Gurry* (1913) 121 Md. 534, 88 Atl. 546. The Louisville ordinance involved a restraint on alienation, and not on the continuance of present use. But interference with freedom to sell demands as much justification as interference with freedom to use. The proviso in the Louisville ordinance makes it less harsh on present occupants, but it does not save it from being an interference with rights acquired before its passage. Whether those rights were "vested rights" depends upon whether they can constitutionally be cut off by subsequent legislation, which is the issue in dispute.

protected by the federal Constitution". It would have been well to have elaborated the comment on the decisions in which race discriminations had been sustained. It is hardly enough to say that "such legislation must have its limitations".²⁸ Further argument might well have been adduced to sustain the position that the denial of equality of legal freedom occasioned by the ordinance under review was substantial and not formal merely, and that the possibility that the restriction might promote the public peace was too visionary and insignificant to justify so serious an interference with the legal equality of the races.

The decisions of the Supreme Court on various forms of race discrimination do not support the statement of Mr. Justice Harlan that the "Constitution is color-blind",²⁹ but they establish that the propriety of race separation is conditioned on giving to each race equality or something approaching equality of legal opportunity, even though they do not receive identical treatment. The Supreme Court's studies in chiaroscuro may not suit the taste of those who insist that the state must be allowed to discriminate between the races as it pleases, or not to discriminate at all. But to those who are aware that differences of degree affect all questions of the police power,³⁰ the Supreme Court will not seem guilty of inconsistency. Its decisions have shown leniency towards the sensibilities of the white race in the Southern states so long as those sensibilities found expression in laws imposing only ephemeral or intermittent separation of the races or in laws specifically aimed against miscegenation. But when steps are taken to impose continuous and permanent barriers to the freedom of the members of either race to settle their abode where they will and can, the Supreme Court has wisely refused to accept fictions of equality in the face of the obvious fact of inequality.

T. R. P.

ACCUMULATED CORPORATE EARNINGS AND THE INCOME TAX.—For a proper interpretation of the federal income tax laws, their constitutional setting must always be kept in mind. The Pollock case,¹ held that Congress was not authorized to levy a tax on income, whether derived from realty or from personalty, because such was, in effect, a direct tax on the property itself and, therefore, unconstitutional under Article 1, § 9 requiring direct taxes to be apportioned according to population. To obviate this difficulty, the Sixteenth Amendment was adopted February 25, 1913. Under the authority of this Amendment, the Federal Income Tax Law of 1913² was passed, taxing "income arising or accruing from all sources in the preceding calendar year", but for the year 1913 only that "accruing from March first". Corporations were made subject to the normal tax on much the same terms as individuals, and dividends from corporations were expressly included

²⁸38 Sup. Ct., at p. 20.

²⁹*Plessy v. Ferguson*, *supra*, footnote 5, at p. 559.

³⁰*Cf.*, Holmes, J., in *Rideout v. Knox*, *supra*, footnote 20, at p. 372: "It may be said that the difference is only one of degree; most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined."

¹*Pollock v. Farmers' Loan & Trust Co.* (1895) 158 U. S. 601, 15 Sup. Ct. 912.

²38 Stat. 166, c. 16.

as income. In the recent case of *Lewellyn v. Gulf Oil Corporation* (3 C. C. A. 1917) 245 Fed. 1, where a holding corporation received from its subsidiaries dividends declared subsequent to March 1, 1913, out of earnings accumulated prior to that date, the court upheld an income tax assessment based on the full value of the dividends. No money changed hands, the whole operation requiring only a book transfer. In its simplest terms, the case is merely one of cash dividends to an individual shareholder.³

It is submitted that the court, perhaps by following too closely the theory of corporate entity, failed to grasp the true state of affairs, with resulting injustice to the taxpayer. It is easy to say that the earnings belong to the corporation before and to the shareholder after the declaration of a dividend, but that is merely a convenient way of stating a result. What is really meant is, that the rights of the shareholder in reference to the money are different after distribution than they were before. Who owns property, on a final analysis, but individuals? Any property may be tied up in such a way that the owner may not be able to use it as he pleases, but that only means that his rights in reference to it are qualified or different. Take the case of a partner in relation to the partnership assets, or of a tenant in common to the unpartitioned property. Again, it is said that the legal title to trust property is in the trustee, but is that anything more than a technical way of stating the qualified rights of a *cestui que trust*? Only after stripping the relationship of the shareholder to the corporate assets of all philosophical conceptions, which only becloud the issue, is it possible to consider his liabilities under the income tax laws.

Just what is meant by "income" is very difficult to say; the term as used in the Sixteenth Amendment must necessarily be broad. The statute says "gains, profits and income" "arising or accruing * * * in the preceding calendar year". This, without much doubt, includes gains made on the sale of capital assets which have increased in value—the difference in value between two given points of time.⁴ Obviously the extent of time is an important element,—in the statute under consideration so much increase *per year*. This does not mean that appreciation in value of capital assets is taxed; that is not being done under the present law as administered.⁵ But when the whole or part of the appreciation has been realized, then the tax is levied. Even if the whole sum is assessed for the year when received, that does not signify that it is all income of that year. The taxpayer is merely paying retroactively on the income for the back years which have

³In 18 Columbia Law Rev. 63, the case of *Towne v. Eisner* (D. C. 1917) 242 Fed. 702 was considered. In that case the court held that stock dividends declared out of earnings accumulated before March 1, 1913 were to be taxed as income when received. Two questions were plainly involved: whether or not stock dividends were income under the statute, and, if so, were they taxable if declared out of money earned prior to March 1, 1913. Since the printing of that note, the Supreme Court has decided (*Towne v. Eisner*, U. S. Sup. Ct., Oct. Term 1917, No. 563), as the Review contended, that stock dividends were not to be taxed as income under the 1913 law. Plainly the second question presented in the *Towne* case in the lower court is no longer open for discussion; but the instant case raises the same point as applied to cash dividends.

⁴Montgomery, *Income Tax Procedure for 1917*, at p. 18 *et seq.*

⁵Letter to Collectors, August 14, 1914. Corporation Trust Co. Income Tax Service § 260.

escaped the tax. But the income of 1912 or any prior year is not subject to the tax, for, until the Sixteenth Amendment went into effect, March 1, 1913, Congress was not authorized to tax incomes. As a result, the value of the property as of March 1, 1913 is taken as a starting point and only increase in value subsequent thereto can be considered.⁶ What is to be done in the case of a holder of a share of stock? The court in the instant case says, in effect, that the accumulated earnings of the corporation shall not be allowed to increase the value of the shareholder's assets; that the earnings belong to the corporation; presumably, that the value of the share is only the nominal capital value.⁷ It is submitted that this method of reasoning is highly artificial and that the result reached is unsound. Surely the capital assets of the individual as of March 1, 1913 are different from the mere nominal value of the share. Just what the true value is may be somewhat difficult to say—perhaps the shareholder's undivided share of the total corporate assets, or else the market value of the shares. Whichever criterion is the correct one, that value represents the taxpayer's capital assets as of March 1, 1913, and any sum returned in dividends which depreciates such capital value is a return of capital, and it is unconstitutional to tax it as income.

The authorities other than federal are not of much influence in the present case. Either the wordings of the statutes are different, or the taxing power was not limited as was that of Congress before the Sixteenth Amendment.⁸ It is, however, essential to examine the various federal cases to see how they have lined up on the question, prior to

⁶Under the Corporation Excise Tax Law of 1909, 36 Stat. 112, c. 6, it was decided that, where shares were held over a number of years, only increase in value subsequent to the time when the law went into effect could be taxed as income to the corporation. *Gauley Mountain Coal Co. v. Hays* (C. C. A. 1915) 230 Fed. 110.

⁷Under the Corporation Excise Tax Law of 1909, *supra*, footnote 6, where a corporation held shares of another corporation, their market value as of January 1, 1909 was taken as the value on which to measure increases for the purpose of ascertaining income, *Cleveland, etc. Ry. v. United States* (C. C. A. 1917) 242 Fed. 18, which is clearly an authority *contra* to the view taken by the court in the instant case. The same is also true of *Gauley Mountain Coal Co. v. Hays*, *supra*, footnote 6.

⁸In *Trefry v. Putnam* (Mass. 1917) 116 N. E. 904, the situation was much the same as in the instant case, for a constitutional amendment similar to the Sixteenth Amendment had been adopted in 1915, and the court upheld the tax levied. The Wisconsin cases, *Van Dyke v. Milwaukee* (1915) 159 Wis. 460, 146 N. W. 812, 150 N. W. 509; *State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Com.* (Wis. 1917) 163 N. W. 639, must be read in connection with the special wording of their statute which says income "received". However, it would seem that this difference is only apparent and that the cases are in accord with the instant decision. But see the dissenting opinion in *State ex rel. Pfister v. Widule* (Wis. 1917) 163 N. W. 641, at p. 643. In an English case, *Gramophone & Typewriter, Ltd. v. Stanley* [1906] 2 K. B. 856, [1908] 2 K. B. 89, it was held that earnings of the subsidiary corporation were not income of the holding corporation until declared as dividends; apparently to be income when they were declared. This case in no wise attacks the stand taken in the present writing, as it is admitted that there must be separation of appreciation before the tax can be levied. If it is all taxed as income when received, then, it is submitted, the tax is retroactive; however, a Parliament, unrestricted by a constitution, may make its law as retroactive as it pleases.

the final decision by the Supreme Court, which may come at any time now. The case of *Lynch v. Turrish*,⁹ also in the circuit court of appeals, is cited by the court in the instant case and disregarded as distinguishable. It is submitted that it is clearly *contra*, and that the decision of the highest court on it will be decisive of the instant case. The facts were, that all the capital of a corporation was invested in land which had increased in value prior to March 1, 1913, but such value had remained stationary, subsequently, until sold. The money was distributed as dividends, and the court held that the recipient did not have to pay an income tax on any part of the sum received. The case is sound, for the distribution was one of capital as of March 1, 1913. But were the rights of the shareholder in reference to this increase in value any fuller than in reference to the earnings collected by the corporation in the instant case? If the undivided share of the corporate assets or the market value of the share, as of March 1, 1913, was the capital of the shareholder on that date in the former case, why is not the same true in the latter? From the point of view of the corporation, the increase in the value of the land was increase in capital assets with, as yet, no separation, while the accumulated earnings were clearly separated income. From the point of view of the shareholder, however, the increase in corporate assets resulted in an increase in his capital assets in one case, if it did in the other.¹⁰

STATE REGULATION OF COMMUTATION RATES.—With the growth of railroad industry, there has been an increasing tendency on the part of state legislatures to regulate intrastate rates, and the course of this regulation has been and will continue to be profoundly affected by the attitude of the courts towards such legislation. In this respect, the recent case of *Pennsylvania R. R. v. Towers* (1917) 38 Sup. Ct. 2, and *Lake Shore & Michigan Southern Ry. v. Smith*,¹ decided eighteen years earlier, are of particular interest as furnishing the basis for an inference as to the possible development of the law during the period embraced within the dates of the two decisions. In the earlier case, the Supreme Court decided, by a divided bench, that a Michigan statute requiring railroads to furnish mileage books, good for two years and usable by the purchaser or his family, at a

⁹(C. C. A. 1916) 236 Fed. 653. *Lynch v. Hornby* (C. C. A. 1916) 236 Fed. 661, was decided at the same time and in the same way. In that case only part of the property holdings in the corporation—timber lands—was sold, and the money returned as dividends. *Southern Pac. Co. v. Lowe* (D. C. 1917) 238 Fed. 847 is directly in line with the instant case. The decision which was overruled by the instant case, *Gulf Oil Corporation v. Lewellyn* (D. C. 1916) 242 Fed. 709, is well reasoned and brings out clearly the issue now to be decided by the Supreme Court.

¹⁰A later statute clearly recognizes the defect of the 1913 law; 39 Stat. c. 463, Title I, pt. 1, § 2(a) "the term 'dividends' * * * shall be held to mean any distribution * * * by a corporation * * * out of its earnings or profits accrued since March first, nineteen hundred thirteen". § 2 (c). "For the purpose of ascertaining the gain derived from the sale * * * of property, real, personalty, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis of determining the amount of such gain derived."

¹(1899) 173 U. S. 684, 19 Sup. Ct. 565.

rate somewhat below that set for ordinary passenger service, was unconstitutional. The Towers case held, three judges dissenting, that, when a railroad had recognized the necessity and propriety of rendering a particular service to suburban communities by establishing commutation rates, the state might reasonably regulate such rates, and fix them below the maximum charge for general service.

While respecting the decision of the Supreme Court in the Smith case,² the tendency has been to restrict it to its particular facts. Thus state statutes requiring free transportation for policemen while traveling in pursuance of their duties,³ and reduced fares for militiamen,⁴ and school children⁵ have been upheld by some state courts, though it is true that there is a split of authority and the questions have never been squarely before the Supreme Court.⁶ In 1900, the Interstate Commerce Commission intimated that the regulation of commutation rates was beyond governmental control,⁷ but, in 1912, when the question was before it, the Commission, although doubting its power to compel a railroad to introduce commutation rates, upheld its authority to regulate such rates where a railroad had already introduced them.⁸ The trend of these decisions seems in favor of the holding in the Towers case. And the question is raised whether that decision can be considered consistent with the earlier opinion in the Smith case, or whether it is indicative of a gradual change in the judicial attitude towards rate regulation.

The exception in the case of mileage books must be justified, if at all, on the basis that such a method of doing business introduces new factors such as the enabling of a railroad to simplify its book-keeping

²*Commonwealth v. Atlantic Coast Line Ry.* (1906) 106 Va. 61, 55 S. E. 572; *Beardsley v. New York, etc. R. R.* (1900) 162 N. Y. 230, 56 N. E. 488, holding the mileage book law invalid as regards railroads incorporated before its enactment. The law is, however, valid as regards railroads incorporated after its enactment. *Purdy v. Erie R. R.* (1900) 162 N. Y. 42, 56 N. E. 508.

³*State v. Sutton* (1912) 83 N. J. L. 46, 84 Atl. 1057, aff'd. 244 U. S. 258; *contra*, *Wilson v. United Traction Co.* (1902) 72 App. Div. 233, 76 N. Y. Supp. 203.

⁴*State v. Chicago, etc. Ry.* (1912) 118 Minn. 380, 137 N. W. 2; *contra*, *In re Gardner* (1911) 84 Kan. 264, 113 Pac. 1054.

⁵"As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss." *Commonwealth v. Interstate Consol. Street Ry.* (1905) 187 Mass. 436, 439, 73 N. E. 530, aff'd. 207 U. S. 79.

⁶The Massachusetts law requiring street railways to carry school children at half fare, *Commonwealth v. Interstate Consol. Street Ry.*, *supra*, was upheld in *Interstate Consol. Street Ry. v. Commonwealth* (1907) 207 U. S. 79, 28 Sup. Ct. 26, on the ground that it was passed before the company's charter was granted, and became part of that charter. Mr. Justice Holmes intimated that the result would have been the same regardless of these special facts. *State v. Sutton*, *supra*, was affirmed in *Sutton v. New Jersey* (1917) 244 U. S. 258, 37 Sup. Ct. 508. The Court, however, laid emphasis upon the fact that the company had taken its charter subject to alteration by the state.

⁷*Sprigg v. Baltimore & Ohio R. R.* (1900) 8 I. C. C. 443.

⁸*Commutation Rate Case* (1911) 21 I. C. C. 428. The same view has since been taken by the New York courts. *People ex rel. New York, etc. R. R. v. Public Service Comm.* (1915) 215 N. Y. 689, 109 N. E. 1089, affirming 159 App. Div. 531, 145 N. Y. Supp. 503.

system and to secure extra cash assets in advance. Mileage books are practically nothing more nor less than single tickets sold at wholesale, with the added feature that they may be used for a trip of any length whatsoever. This is clearly a discrimination in favor of those who can afford to purchase in large lots,⁹ a type of discrimination which has always been frowned upon.¹⁰ And although it has been permitted in some instances, yet railroad commissions have consistently refused to compel it.¹¹ Commutation tickets, however, although they have much in common with mileage books, in that they enable the carrier to obtain a larger amount of patronage together with a reduced cost of book-keeping, accounting and other expenses incidental to the issuance of separate tickets,¹² deal, nevertheless, with a wholly different type of service.¹³ By means of them, an individual secures the right to travel between two points for a certain period of time, and the charge is the same whether or not the privilege is entirely used. True, they are issued in favor of a particular class of travellers, but generally it is a class which the railroads themselves have created. Relying upon them, a large group of commuters has arisen; and the arbitrary withdrawal of such tickets would work an unjustifiable hardship. Since the public as well as the railroad is to be considered in determining rates,¹⁴ and since the establishment of this type ticket by the railroads

⁹"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof." *Lake Shore, etc. Ry. v. Smith, supra*, footnote 1, at pp. 692-693.

¹⁰*Burlington, etc. Ry. v. Northwestern Fuel Co.* (C. C. 1887) 31 Fed. 652; *Providence Coal Co. v. Providence, etc. R. R.* (1887) 1 I. C. C. 107; see *United States v. Tozer* (D. C. 1889) 39 Fed. 369.

¹¹*Field v. Southern Ry.* (1908) 13 I. C. C. 298.

¹²And in this respect they are somewhat analogous to carload rates on freight. *California Commercial Ass'n. v. Wells, Fargo & Co.* (1908) 14 I. C. C. 422; see *Commutation Rate Case, supra*.

¹³See *Commutation Rate Case, supra*. In this respect it is to be noted that freight rates differ with commodities according to the service rendered, and "The charges for the carriage of freight of different kind are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in cost of transportation, as well as the form, size and value of the packages and the cost of handling them." *Minneapolis & St. Louis R. R. v. Minnesota* (1902) 186 U. S. 257, 267, 22 Sup. Ct. 900; see *Seaboard Air Line Ry. v. Florida* (1906) 203 U. S. 261, 27 Sup. Ct. 109.

¹⁴*Smyth v. Ames* (1898) 169 U. S. 466, 547, 18 Sup. Ct. 418, where the Court said: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." See *Texas, etc. Ry. v. Interstate Com. Comm.* (1896) 162 U. S. 197, 233, 16 Sup. Ct. 666. So, although a fair return is allowed the company, yet where a lack of profit is due to poor management, see *Dow v. Beidelman* (1888) 125 U. S. 680, 8 Sup. Ct. 1028; *Railway Co. v. Smith* (1895) 60 Ark. 221, 243, 29 S. W. 752, or to the fact that the road has been laid out through sparsely settled country with the idea of bettering the interstate route, or in expectation of the growth of the community, *In re Arkansas Railroad Rates* (C. C. 1909) 168 Fed. 720, 732; *Southern Pacific Co. v. Bartine* (C. C. 1909) 170 Fed. 725, 767, the public will not be forced to stand the loss.

shows *prima facie* that the return is adequate, the basis for its public control would seem unquestionably sound.

The Towers case seems to draw a further distinction, namely, that the railroad had already started the practice of issuing commutation tickets, whereas in the Smith case there was no proof of prior issuance of mileage. But in the Smith case the Court said: "It is no answer to the objection to this legislation, to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature."¹⁵ If this statement was intended to prohibit mere regulation, as well as to deny the power to require the new type of service, it would seem to be at least questioned if not entirely overruled. The only valid objection to the statute in the Smith case was that it required the company to furnish a sort of service which it was under no duty to furnish. On this ground the case might be sustained despite the Towers decision, for there would seem to be the basis for a sound distinction between commutation tickets and mileage books. It is probable, however, that the opinion in the instant case indicates a change in political thought and that, with the Supreme Court's more liberal attitude towards regulatory legislation, a statute requiring the issuance of mileage would be upheld to-day.

DEFENSES OF A SURETY BASED UPON THE NON-LIABILITY OF THE PRINCIPAL DEBTOR.—An obligation which will place the one assuming it in the position of a surety, provided the other requisites of the relation of suretyship are present, may result from the making of a promise of any content whatever. But the more common of such promises are of three types.¹ The first is a promise by *A* jointly, or jointly and severally, with *B* to *C*, to do some act. The second is a separate promise by *A* to *C* to do some act if *B* does not.² The third is a promise by *A* to *C* to answer for the debt, default or miscarriage of *B*.

A, in these cases, if his promise is obligatory, will be a surety if there is a primary obligation, intended to be secured, owing from *B*, the principal, to *C*. But *A*'s obligation to perform his promise depends upon the normal principles of contract law and the fourth section of the Statute of Frauds, and not upon whether he will be a surety if he is bound.³ This position is fully borne out by the decisions of the

¹⁵Lake Shore, *etc.* Ry. v Smith, *supra*, footnote 1, at p. 697.

¹In order to avoid repetition it has been thought advisable to refer to the one who assumes an obligation which may be that of a surety as *A*, to the one to whom this obligation is owing as *C*, and to the one who would be in the position of a principal if *A* was a surety, as *B*.

²A promise of the second type differs from one of the first type in that it is a separate promise conditioned upon the failure of *B* to do some act, while the latter is a joint, or joint and several, promise with *B*; and it differs from the third type in that it makes no reference to a promise or obligation from *B* to *C*, while a promise of the third type is one to answer for a promise or obligation from *B* to *C*.

³The two questions, the one as to whether *A* is bound upon his promise, the other, as to whether he is a surety, do not appear, always, to have been distinguished. See 13 Columbia Law Rev. 426; 1 Brandt, Suretyship and Guaranty (3rd ed.) 163; Childs, Suretyship and Guaranty, § 129. In fact, it is generally said that the liability of the surety is measured by

courts, although their opinions contain some confusing *dicta*. Thus, when *C* sues *A* upon his promise, an answer made by *A* that *B* had never made a promise to *C*,⁴ or that *B*'s promise resulted in no obligation, or an imperfect one, because of *B*'s personal incapacity by reason of coverture,⁵ infancy,⁶ lunacy,⁷ or the act being *ultra vires*,⁸ has been held to be no defense. Similarly, it is no defense to *A* that *B* had a right to avoid his obligation because of fraud⁹ or duress¹⁰ practiced upon him by *C*.¹¹ In the recent case of *Ettlinger v. National Surety*

that of the principal. The cases holding that a party who has promised in one of the manners described in the text is liable despite the absence of any liability on the part of the principal are noted as exceptions "where the defense of the principal is personal".

⁴*Lakeman v. Mountstephen* (1874) 7 Engl. & Ir. App. 17. It would seem that the same principle is involved where *A* thought that two principals were obligated and, in fact, only one was bound. In this case *A* is generally liable. *Stewart v. Behm* (Pa. 1834) 2 Watts 356; *Pelzer v. Campbell* (1880) 15 S. C. 581; *McLaughlin v. McGovern* (N. Y. 1861) 31 Barb. 208; *Dickerman v. Bowman* (1861) 14 Wis. 388; *contra*, *Russell v. Annable* (1870) 109 Mass. 72. The dissenting opinion of Wells, *J.*, in the last mentioned case, gives a forcible presentation of what would seem to be the correct view of the law.

⁵*Kimball v. Newell* (N. Y. 1845) 7 Hill 116; *Jones v. Crosthwaite* (1864) 17 Iowa 394; *Winn v. Sanford* (1887) 145 Mass. 302, 14 N. E. 119; *Davis v. Staats* (1873) 43 Ind. 103; *St. Albans Bank v. Dillon* (1857) 30 Vt. 122; *Wagoner v. Watts* (1882) 44 N. J. L. 126.

⁶*Parker v. Baker* (N. Y. 1839) Clarke Ch. 136; *Wauthier v. Wilson* (1911) 27 T. L. Rep. 582; *cf.*, *Kuns's Exec. v. Young* (1859) 34 Pa. 60. It has been held that if *B*, the infant principal, disaffirms his contract and returns the consideration received, *A* is not obligated, on the ground, apparently, of a failure of the consideration for his promise, *i. e.*, the giving of a consideration to *B* by *C*. *Baker v. Kennett* (1873) 54 Mo. 82; *Keokuk State Bank v. Hall* (1898) 106 Iowa 540, 76 N. W. 832. It is submitted that a sounder conclusion was reached in *Kyger v. Sipe* (1892) 89 Va. 507, 16 S. E. 627, where *A* was held liable for the debt of *B*, the infant, less the value of the property returned to *C* by *B* upon disaffirmance.

⁷*Lee v. Yandell* (1887) 69 Tex. 34, 6 S. W. 665; *cf.*, *Caldwell v. Ruddy* (1881) 2 Idaho 1, 1 Pac. 339, where the court put their decision upon the ground that *A* impliedly promised that *B* was capable of contracting; but *cf.*, *Glove v. Johnson* (1888) L. R. 24 Ir. 352.

⁸*Yorkshire Ry. & Wagon Co. v. Maclure* (1881) 19 Ch. D. 478; *Mitchell v. Hydraulic Bldg. Stone Co.* (Tex. 1910) 129 S. W. 148, not officially reported; *State v. Bullard* (1875) 72 N. C. 441; *Mason v. Nichols* (1867) 22 Wis. *376.

⁹*Walker v. Gilbert* (1846) 15 Miss. 456; *Elliot v. Brady* (1908) 192 N. Y. 221, 85 N. E. 69; *Henry v. Daley* (N. Y. 1879) 17 Hun 210; but see *Whitcomb v. Shultz* (C. C. A. 1915) 223 Fed. 268.

¹⁰*Plummer v. People* (1855) 16 Ill. 358; *Hazard v. Griswold* (C. C. 1884) 21 Fed. 178; *Huscombe v. Standing* (1607) Cro. Jac. 187; *Mantel v. Gibbs* (1609) Brownlow 64; *Oak v. Dustin* (1887) 79 Me. 23, 7 Atl. 815; *Robinson v. Gould* (1853) 65 Mass. 55; *cf.*, *Bowman v. Hiller* (1881) 130 Mass. 153. The cases where a close relationship exists between *A* and *B* must be distinguished. In these cases *A* is released, not because of duress practiced upon *B*, but because, by the threatening of harm to *B*, duress is actually committed upon *A*. *Osborn v. Robbins* (1867) 36 N. Y. 365; *Harris v. Carmody* (1881) 131 Mass. 51.

¹¹An analogous class of cases is that in which it is held that *A* has no defense against *C* since the latter has no remedy against *B*, either because of the Statute of Frauds, *Backus v. Feeks* (1913) 71 Wash. 508,

Co. (1917) 217 N. Y. 467, 117 N. E. 945, the defendant, a surety company, gave to the plaintiff a bond, apparently executed jointly with one Kruger,¹² providing that it would pay, in a certain event, the amount involved in an action brought against Kruger. When sued upon the bond, the defendant interposed the defense that Kruger's execution of the bond was induced by the fraud of the plaintiff. It was held, in accordance with the prevailing view, that the fraud upon Kruger was no defense to the defendant surety company.

Although *A* has no defense in a suit upon his promise merely by reason of the absence of an obligation on the part of *B*, yet the non-existence of such an obligation may be one of the facts giving rise to a number of possible defenses. *A* might have made a promise that was expressly conditioned upon the existence of a right by *C* against *B*. If that were the case, certainly the surety would have a good defense if no such obligation existed. It seems clear, however, that no such condition is expressed in what we have classified as a promise of the first type¹³ where *A* promises jointly with *B*, or in our second type¹⁴ where *A* promises to do some act if *B* does not. In our third type, however, *A* promises to answer for the debt, default or miscarriage of *B*. Whether, in this case, the existence of a debt from *B* to *C* is a condition of *A*'s obligation to *C* depends wholly upon the meaning of the language expressing *A*'s promise. This in turn depends upon the context, *viz.*, the circumstances accompanying the use of the language. In most instances, *A*'s promise will be found to assume the existence of a relation between *B* and *C* under which *B* is expected to perform an act for *C*, rather than a legal obligation owing from *B* to *C*; and the condition of *A*'s promise will be found to be a non-performance by *B*, rather than a legal default. Thus, where it appeared that the parties had in mind a particular promise made by *B*, the fulfillment of which was guaranteed by *A*, *A* was held liable although *B*, by reason of her coverture, incurred no obligation.¹⁵ Again, where the parties had in mind a particular writing which they thought obligated *B*, it was held that, even though *B* was not in fact bound, a guarantee of the writing was equivalent to a promise that the amount mentioned therein would be paid to *C*.¹⁶

129 Pac. 86; see *Church v. Swanson* (1901) 100 Ill. App. 39; see 13 Columbia Law Rev. 426, or the Statute of Limitations, *Minter v. Branch Bank* (1853) 23 Ala. 762; *Whiting v. Clark* (1881) 17 Cal. 407; *Wagoner v. Watts*, *supra*, footnote 5; *contra*, *Mulvane v. Sedgley* (1901) 63 Kan. 105, 64 Pac. 1038; *Auchampaugh v. Schmidt* (1886) 70 Iowa 642, 27 N. W. 805, or a failure to comply with the recording acts. *Waterson v. Owens River Canal Co.* (1914) 25 Cal. App. 247, 143 Pac. 90.

¹²The fact that Kruger joined in the bond does not appear in the report. It is believed, however, that he did join, as nothing to the contrary appears, and as it is only on that assumption that the question to which the court addressed itself would have been raised. It will be seen that, if Kruger had not joined, the obligation of the surety company could only have been intended to secure the obligation of Kruger in the original action, and no fraud is alleged by the surety company in the securing of that obligation. Upon the assumption that Kruger did not join, the case would be one where *B*, induced by *C*'s fraud, without fraud upon *A*, procured him to obligate himself to *C*. Certainly in such a case *A* has no defense.

¹³*Weare v. Sawyer* (1862) 44 N. H. 198.

¹⁴*Lakeman v. Mounstephen*, *supra*, footnote 4.

¹⁵*Kimball v. Newell*, *supra*, footnote 5.

¹⁶*Jones v. Thayer* (1860) 78 Mass. 443.

Despite the fact that all the events upon which *A*'s promise are conditioned have occurred,¹⁷ he may avail himself of certain defenses arising from other circumstances, including the absence of an obligation owing from *B* to *C*. If *C* makes a fraudulent misrepresentation to *A* or a concealment from him concerning any part of the transaction materially affecting *A*'s position, *A* will not be bound by an obligation assumed as a result of the fraudulent misrepresentation or concealment.¹⁸ Often the fraudulent misrepresentation or concealment is concerned with *B*'s character, past conduct, financial standing or state of indebtedness.¹⁹ But a fraudulent misrepresentation or concealment as to the facts upon which the existence of an obligation between *B* and *C* depends is also sufficient to allow *A* to avoid his contract.²⁰ That this is sound would seem to be unquestionable, as the non-existence or imperfection of the obligation owing from *B* to *C* greatly increases the likelihood of *A* being called upon to pay. It is in this doctrine of fraudulent concealment that the true explanation is found of those cases which hold that *A* may avoid his obligation if he has entered into it in ignorance of fraud or duress that has been practiced upon *B* by *C*.²¹ A mutual mistake of fact as to the existence of an obligation

**A* may, of course, make a promise upon any condition. Very often *A* makes a conditional promise jointly with *B* or guarantees the performance of a conditional promise by *B*. In either case, it would seem that *C* could not hold *A*, any more than he could *B*, till that condition was performed. *Scroggin v. Holland* (1852) 16 Mo. 419; *Stockton, etc. Co. v. Giddings* (1892) 96 Cal. 84, 30 Pac. 1016; *Mitchum v. Richardson* (S. C. 1848) 3 Strobb L. 254. Where the same consideration was given for *A*'s promise as for *B*'s, a failure of that consideration is a defense for both of them. *Duggan v. Monk* (1908) 5 Ga. App. 206, 62 S. E. 1017; *Adams v. Cuny* (1860) 15 La. 458; *Sawyer v. Chambers* (N. Y. 1864) 43 Barb. 622; *cf.*, *Ross v. Woodcliff* (1814) 18 Va. 324.

¹⁸As to the effect upon *A*'s liability of misrepresentation by *C*, see *Brandt, op. cit.*, § 447; *Remington Sewing Machine Co. v. Kezartee* (1880) 49 Wis. 409, 5 N. W. 809; *Ham v. Greve* (1870) 34 Ind. 18. And as to fraudulent concealment, see *Warren v. Branch* (1879) 15 W. Va. 21; *Sooy v. State* (1877) 39 N. J. L. 135; *Bryant v. Crosby* (1853) 36 Me. 562. *Franklin Bank v. Cooper* (1853) 36 Me. 179, at p. 197, contains a good statement of the doctrine: "To receive a surety known to be acting upon the belief, that there are no unusual circumstances, by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud by which the surety will be relieved of his contract."

¹⁹*First Nat'l. Bank v. Clark's Estate* (1915) 59 Colo. 455, 149 Pac. 612; *Sooy v. State, supra*, footnote 18; *Blest v. Brown* (1862) 3 Gif. 450; *Railton v. Matthews* (1844) 10 Cl. & F. 934.

²⁰A fraudulent misrepresentation or concealment from *A* of the want of consideration between *C* and *B* has been held a defense to *A*. *Hook v. White* (1901) 201 Pa. 41, 50 Atl. 290; *Willis v. Willis* (1850) 17 Sims. 218; *Wile v. Wright* (1871) 32 Iowa 451; *Mendelson v. Stout* (N. Y. 1874) 5 J. & S. 408; *cf.*, *Evans v. Keeland* (1846) 9 Ala. 42. Similarly, where the creditor fraudulently represented that *B*'s forged signature was genuine, *A* was not held. *Denton v. Morford* (1891) 13 Ky. L. R. 94; *Klamon v. Malvin* (1883) 61 Iowa 752, 16 N. W. 356.

²¹See *Rowlatt, Principal & Surety*, 158. This doctrine has been applied in cases of fraud, *Putnam v. Schuyler* (N. Y. 1875) 4 Hun 166; *Waterbury v. Andrews* (1887) 67 Mich. 281, 34 N. W. 575, and of duress.

owing by *B* might be still another ground which would afford *A* a defense; that is, if both *A* and *C* suppose that *B* has done an act obligating himself, when in fact he has not, *A* should, it seems, have a defense.²²

There are, no doubt, many other situations which may afford *A* and *B* defenses upon their respective undertakings.²³ But, in view of the foregoing analysis of various typical situations, it would seem clear that a promise which may give *A*, the promisor, the position of a surety is governed by the same rules as any other promise. The mere fact that *B*, the supposed principal, is himself under no obligation is no defense to *A* in a suit upon his promise, and the cases which might give rise to that inference can practically all be explained upon the normal principles of contract law.

EFFECT OF SUBSEQUENT LEGISLATION UPON SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REALTY.—Injury to, or destruction of, the subject matter of a sale during the pendency of an executory contract raises the question upon whom the burden of loss shall fall. It is elementary that in ascertaining rights under a contract the courts will look at the intention of the parties, and, unless contravened by some rule of law, such intention will control. But in the absence of any express intention, the courts will resort to presumptions of law. Thus, in the case of a contract for the sale of personalty, various rules of thumb have been developed to aid the court in determining the respective rights of the parties.¹ Similarly, in the case of an agreement to sell realty, recourse must be had to rules of law if there is no express intent as to who shall bear the loss.

It is usually stated that the risk of loss in an executory contract for the sale of land falls upon the vendee because, in equity, he is the

Hager v. Mounts (Ind. 1832) 3 Blackf. 57; Griffith v. Sitgreaves (1879) 90 Pa. 187; Patterson v. Gibson (1888) 81 Ga. 802, 6 S. E. 840; Graham v. Marks (1895) 98 Ga. 67, 25 S. E. 931; Baker v. Steele (1915) 61 Pa. Super. Ct. 483.

²²See Lakeman v. Mountstephen (1872) L. R. 7 Q. B. 196, 202; but *cf.*, Jones v. Thayer, *supra*, footnote 16.

²³For instance, if contracts upon certain subjects are void at common law or under statute, it has been held that, since the subject matter of *A*'s and *B*'s contracts is the same, the obligation of neither may be enforced. Thompson v. Lockwood (N. Y. 1818) 15 Johns. 255; United States v. Tingey (1831) 30 U. S. 115; see Hawes v. Marchant (U. S. 1852) 1 Curtis Cir. Ct. Rep. 136.

¹For instance, if the contract is made in reference to unspecified goods and there has been no appropriation, title will be presumed not to have passed, and, in case the goods are destroyed, the loss falls upon the vendor. Anderson v. Morice (1875) L. R. 10 C. P. 609. Again, where the courts find that the legal title is retained by the seller only for the purpose of security, as in a conditional sale, American Soda Fountain Co. v. Vaughn (1903) 69 N. J. L. 582, 55 Atl. 54, or in a shipment, in pursuance of an order, under a bill of lading, Browne v. Hare (1858) 3 H. & N. *484; Williston, Sales, § 305, the burden of loss will be thrown upon the vendee for he is the beneficial owner.

owner.² And his status is said to be like that of a *cestui que trust* or mortgagor. Having equitable title, all ordinary results follow. For example, his interest constitutes assets so that he can assign it or charge it;³ it descends to his heirs,⁴ is devisable,⁵ and, in those jurisdictions which permit a wife to have dower in the equitable estate of her husband, the widow of the vendee gets dower.⁶ The vendor is bound in equity to convey, and a purchaser with notice from him takes subject to the grantor's obligations.⁷ The property is, furthermore, not subject to attachment by the seller's creditors.⁸ Any loss or deterioration in the subject matter, such as the burning of the house without fault of either party, will, consequently, be borne by the vendee,⁹ as will any sudden increase in the value of the estate inure to his benefit.¹⁰

It is not, however, always true that, upon entering into the contract, the vendee becomes at once the beneficial owner of the property.¹¹ The only reason why a vendee can ever be said to be the equitable owner is because equity will decree specific performance of the contract. It is, therefore, necessary to see first whether the agreement is specifically enforceable. And, although broadly speaking inadequacy of legal remedy gives rise to equity jurisdiction, still, where it does exist (as it always does by conclusive presumption in a case where realty is the subject of the contract) the court may, nevertheless, deny its extraordinary relief. It follows that, if the parties stipulate that a certain condition be fulfilled before performance, equitable title will not pass until such agreement becomes absolute.¹² Likewise, if there is a lack of mutuality,¹³ or if the plaintiff has been guilty of fraud,¹⁴ or if there is

²See William A. Keener, *The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract*, 1 Columbia Law Rev. 1; Harlan F. Stone, *Equitable Conversion by Contract*, 13 Columbia Law Rev. 369, 385; Samuel Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 Harvard Law Rev. 106, 111; see also note in 12 Columbia Law Rev. 257. The doctrine has not been logically extended so as to constitute the vendor a trustee of the insurance money received upon the destruction of the premises. *Rayner v. Preston* (1881) 18 Ch. D. 1; *contra*, *Reed v. Lukens* (1863) 44 Pa. 200. The vendor's right to rents and profits until the time of performance has been explained upon the theory that the extent of the vendee's equitable rights is measured by the purchase price. See 1 Columbia Law Rev. 1.

³See *Shaw v. Foster* (1872) L. R. 5 H. L. 321, 338.

⁴*Langford v. Pitt* (1731) 2 P. Wm. 629.

⁵*Townsend v. Champenowne* (1821) 9 Price 130; *Buck v. Buck* (N. Y. 1844) 11 Paige 170.

⁶*Bailey and Wife v. Duncan's Representatives* (1827) 20 Ky. 256.

⁷*Bailey v. Coffin* (Me. 1916) 99 Atl. 447.

⁸*Scott-Baldwin Co. v. McAdams* (1914) 43 Okla. 161, 141 Pac. 770.

⁹*Paine v. Meller* (1801) 6 Ves. Jr. 349; *Sewell v. Underhill* (1910) 197 N. Y. 168; 90 N. E. 430; *contra*, *Wilson v. Clark* (1880) 60 N. H. 352; *Gould v. Murch* (1879) 70 Me. 288.

¹⁰*Rausch v. Hanson* (1910) 26 S. D. 273, 128 N. W. 611.

¹¹See *Harford v. Purrier* (1816) 1 Madd. 532.

¹²*Gilbert & Ives v. Port* (1876) 28 Oh. St. 276; *Northern Texas Realty & Construction Co. v. Lary* (Tex. Civ. App. 1911) 136 S. W. 843; *Counter v. Macpherson* (1845) 5 Moore P. C. 83; see *Pomeroy, Spec. Perf.* (2nd ed.) § 319.

¹³*Wakeham v. Barker* (1889) 82 Cal. 46, 22 Pac. 1131.

¹⁴*Hargis v. Smith* (Mo. 1915) 178 S. W. 72.

present any element which will prevent the court from acting, it cannot be said that the vendee, in such a case, has become the owner of the estate in equity.¹⁵ The fact that the contract is not specifically enforceable and that the vendee is not, therefore, equitable owner, will protect the vendee in a suit at law for breach of the contract when the reason for equity's refusal to grant relief constitutes a ground for rescission and, therefore, a good defense at law. But where specific performance is denied because of hardship, there is no ground for rescission, and the fact that the chancery court considered it inequitable to enforce the agreement does not constitute a legal defense.¹⁶ Hence, in such a case, the vendee although not the equitable owner will, through an action at law, be compelled ultimately to bear the loss,—though, of course, this loss in money damages need not necessarily be identical with that which he would have suffered had he been compelled to take the property in specie.

With this in mind, the recent case of *Anderson v. Steinway & Sons* (N. Y. Ct. of App. 1917) 117 N. E. 575 presents a particularly interesting problem. A contract for the sale of a certain parcel of city property was entered into on the 13th of July, 1916, and was to be performed on the 1st day of August following. It expressly provided that the estate was to be subject only to a certain restrictive covenant against nuisances. The defendant's sole purpose in purchasing this property was to erect a factory on the premises, a fact of which the plaintiff was aware. On the 25th of July, 1916, the City of New York passed a zoning law dividing the city into residence and business districts, with the result that the property in question was restricted to residential use. The purchaser refused to accept a tender of the deed on the day fixed for the conveyance, and the vendor thereupon filed his bill for specific performance. The court, two judges dissenting, refused to grant relief on the ground that it would be inequitable to enforce the contract.¹⁷

Under the foregoing analysis, the dismissal of the bill in the instant case affords the defendant but little solace, since he is left subject to an action at law. Aside from this, however, the application of the doctrine of hardship ought not, it is submitted, on theory, to have been the ground for the denial of relief. For although a court of equity is a court of discretion, still it cannot arbitrarily or capriciously exercise its powers. Its discretion is judicial, being based on well settled rules, and a plaintiff who brings himself within them can demand relief as a matter of right.¹⁸ That a court will not, as a rule, enforce a contract if it works a hardship on the defendant or proves so unfair that it would be inequitable to have it carried out, is undoubtedly true.¹⁹ But, according to the weight of authority and the better reasoning, such inequality should be judged as of the date of

¹⁵*Blew v. McClelland* (1860) 29 Mo. 304, where the loss was held to fall on the vendor because non-compliance with the Statute of Frauds rendered the contract unenforceable in equity.

¹⁶*Ducas Co. v. Bayer Co.* (1916) 163 N. Y. Supp. 32; *Berg v. Erickson* (C. C. A. 1916) 234 Fed. 817.

¹⁷See opinion of the lower court in 178 App. Div. 507, 165 N. Y. Supp. 608.

¹⁸*Friend v. Smith* (1916) 191 Mich. 99, 157 N. W. 347; *Matthes v. Wier* (1912) 10 Del. Ch. 63, 84 Atl. 878.

¹⁹*Willard v. Tayloe* (1869) 75 U. S. 557; *Brewer v. Herbert* (1869) 30 Md. 301; see *Cumberledge v. Brooks* (1908) 235 Ill. 249, 85 N. E. 197.

the execution of the contract, and, if the agreement in its inception possesses all the elements of fairness both in its terms and in its surrounding circumstances, this requisite is forever satisfied and subsequent events or change of position will not defeat the plaintiff's rights.²⁰ In so far then as hardship was concerned, it would seem that the contract in the principal case ought to have been specifically enforced even though the change in the law prevented the defendant from putting the property to the very use for which it was intended.²¹

The court might very well, however, have denied specific performance on the ground that the title which the vendor tendered on the day fixed for conveyance was an unmarketable one. For it seems clear that the restriction which was here imposed on the estate would, if found in the chain of title, constitute an incumbrance on the property.²² Assuming it be such, as indeed it was within the meaning of this particular contract,²³ the passage of the statute was a contingency which affected, not the subject matter itself, but the title to it, and the vendee not having accepted such defective title would not be made specifically to perform. This would really protect the vendee because it would give him a good defense to an action at law on the contract.

It is perhaps true that no logical distinction can be made between contingencies which affect the subject matter and those which affect the title,²⁴ but, nevertheless, the line of demarcation, though an arbi-

²⁰Revell v. Hussey (1813) 2 Ball. & B. 280; Prospect Park & C. I. R. R. v. Coney Island & B. R. R. (1894) 144 N. Y. 152, 39 N. E. 17; Texas Co. v. Central Fuel Oil Co. (C. C. A. 1912) 194 Fed. 1; Larson v. Smith (1916) 174 Iowa 619, 156 N. W. 813; see Fry, Spec. Perf. (5th ed.) §§ 389, 418; *contra*, Willard v. Tayloe, *supra*, footnote 19. This rule is, of course, subject to certain exceptions, *e. g.*, where the plaintiff's conduct in reference to the particular transaction has not been honorable and fair, Naughton v. Morford-Wood Co. (1914) 90 Oh. St. 61, 106 N. E. 659; where the enforcement will result in great harm to the defendant and slight benefit to the plaintiff, McDowell v. Biddison (1913) 120 Md. 118, 87 Atl. 752; where specific performance, if decreed, would be harsh and oppressive to innocent third parties, Owens v. McNally (1896) 113 Cal. 444, 45 Pac. 710; or where the decree will work a forfeiture of the defendant's estate. Ball v. Milliken (1910) 31 R. I. 36, 76 Atl. 789.

²¹In Adams v. Weare (1784) 1 Bro. C. C. 567, due to events subsequent to the inception of the contract, the vendee was prevented from using the property for the purpose which furnished the inducement for his entering into the agreement, yet specific performance was granted.

²²See Washburn, Real Property (6th ed.) § 2385; Tiedeman, Real Property (3rd ed.) § 617; *cf.*, Foster v. Foster (1882) 62 N. H. 46. But where, subsequent to the passage of the building zone resolution, the parties contracted for the sale of land free from all incumbrances, such ordinance was held not to affect the title since the parties were regarded as having contracted in reference to existing law. Lincoln Trust Co. v. Williams Bldg. Corp. (N. Y. Sup. Ct. 1917) 57 N. Y. L. J. 1368.

²³*Cf.*, Cavanaugh v. McLaughlin (1887) 38 Minn. 83, 35 N. W. 576; Wallach v. Riverside Bank (1912) 206 N. Y. 434, 100 N. E. 50; see cases, *infra*, footnote 26.

²⁴This may be more clearly brought out by the following illustrations: suppose a party contracts to buy realty (1) to be used for the manufacture of fermented and malted liquors,—and thereafter a prohibition law is passed; (2) to be used for a piano factory,—and thereafter a tariff law is enacted which renders the business unprofitable. Perhaps these cases may be distinguished on the ground that, in the former, title has been encumbered, whereas, in the latter, the statute touches the transaction so

trary one, has been drawn. For while, under *Paine v. Meller*,²⁵ equity will decree specific performance despite the destruction of the subject matter by fire, yet it will not do so where, while the contract is still executory, condemnation proceedings have been begun in the exercise of the power of eminent domain.²⁶ Since the doctrine of *Paine v. Meller* finds but little justification either in law or in morals, the courts ought, wherever possible, to limit its application even though in so doing they lay themselves open to the charge of inconsistency.

The failure of the equity court in the instant case to base its decision on the reasoning herein suggested means, it is submitted, that, if the vendee is sued at law and the court really desires to protect him, it will either have to qualify its former opinion, or change its rule and recognize the equitable defense of hardship in such class of cases.

collaterally as only to affect the subject matter. But in cases where the land contracted for has been taken by the state in the exercise of eminent domain, and in cases where a life estate terminates before the date on which it is to be conveyed, is the subject matter or the title affected, or has there been a merger of title and subject matter so that both are affected?

²⁵*Supra*, footnote 9.

²⁶*Johnston v. Callery* (1896) 173 Pa. 129, 33 Atl. 1036; *Kares v. Covell* (1902) 180 Mass. 206, 62 N. E. 244; *cf.*, *Mackey v. Bowles* (1896) 98 Ga. 730, 25 S. E. 834, where the vendee did not have to bear the loss because the vendor had no title to convey; *contra*, *Nixon v. Marr* (C. C. A. 1911) 190 Fed. 913, which may, perhaps, be distinguished on the ground that the vendee was in possession of the premises at the time when condemnation proceedings were begun.

RECENT DECISIONS.

DOUGLAS M. BLACK, *Editor-in-Charge.*

BILLS AND NOTES—COLLATERAL AGREEMENTS—ACCELERATION OF MATURITY.—A mortgage executed at the same time and as security for the note in suit contained a provision accelerating the maturity of the note in the case of non-payment of the interest or taxes. There was default in the payment of interest and the holder of the note sued thereon before its face maturity. *Held*, the action was premature. *Allwood v. Harrison* (Okla. 1917) 168 Pac. 440.

It is now well settled that the validity of a negotiable instrument is not impaired by a provision that the time of maturity may be accelerated on the happening of a contingency within the control of the maker. *Wilson v. Campbell* (1896) 110 Mich. 580, 68 N. W. 278. Moreover the weight of authority upholds the doctrine that a collateral agreement in writing executed at the same time and in connection with the note for which it is security has no effect upon the negotiability of the note itself. *Barker v. Sartori* (1911) 66 Wash. 260, 119 Pac. 611; 17 Columbia Law Rev. 644. Since the making and delivery of a writing in the form of a note of itself creates an obligation by the law merchant, any other agreement executed therewith is a separate and distinct contract and at most can be treated as giving rise to a defense or counterclaim and not as modifying the content of the obligation resulting from the note. Norton, *Bills & Notes* (4th ed.) 109, *n.* If, however, the collateral agreement is written upon the face of the instrument it will impair negotiability if it amends the terms of the instrument, *Allison v. Hollembeak* (1908) 138 Iowa 479, 114 N. W. 1059, but not where such agreement simply provides for the preservation of the security and does not purport to vary the terms of the principal promise. *Farmer v. First Nat. Bank of Malvern* (1909) 89 Ark. 132, 115 S. W. 1141. Consequently, provisions and conditions in the collateral agreement which relate to the preservation or enforcement of the mortgage security do not affect the status of the note as a negotiable instrument. *Thorpe v. Mindeman* (1904) 123 Wis. 149, 101 N. W. 417. A stipulation in the agreement accelerating the maturity of the note on the happening of any of the defaults mentioned in the agreement is construed to relate to the maturing of the indebtedness only for the purpose of remedies provided therein. *Taylor v. American Bank* (1912) 63 Fla. 631, 57 So. 678; *McClelland v. Bishop* (1884) 42 Oh. St. 113; *White v. Miller* (1893) 52 Minn. 367, 54 N. W. 736; *contra*, *Wheeler & Wilson Mfg. Co. v. Howard* (C. C. 1886) 28 Fed. 741; *Ward v. San Antonio Life Ins. Co.* (Tex. 1914), 164 S. W. 1043. Thus, where a note secured by a mortgage contained provisions inconsistent with it the courts have held in an action on the note that the terms in the note in suit were controlling. *Kennedy v. Gibson* (1904) 68 Kan. 612, 75 Pac. 1044. Therefore, the principal case is in accord with the weight of authority in holding that an action on the note not yet matured according to its face, was premature, notwithstanding the default in the payment of interest giving rise to an action for foreclosure. Norton, *op. cit.* 111, *n.*

CARRIERS-LIABILITY FOR BAGGAGE WHERE PASSENGER IS NOT OWNER.—A travelling salesman in plaintiff's employ took passage on the defendant's line, checking his employer's sample trunks as his own baggage. A fire, the cause of which was unknown, destroyed the trunks in question. *Held*, that though the custom of accepting sample trunks as baggage waived any objection on that score, yet the carrier, having had no knowledge that the passenger was not the owner, was liable, as gratuitous bailee, only for gross negligence or willful misconduct. *Lusk v. Bloch* (Okla. 1917) 168 Pac. 430.

Modern American methods of checking baggage and of running separate trains for it have tended to modify the basic and established conception of baggage as a certain class of articles accompanying the owner incidental to his transportation. As a result it has been held that carriers are under an insurer's liability though the owner take a different train from that carrying the baggage, *cf. McKibbin v. Wisconsin Central R. R.* (1907) 100 Minn. 270, 110 N. W. 964, and even if he does not use his ticket at all. *Alabama Great Southern R. R. v. Knox* (1913) 184 Ala. 485, 63 So. 538. The requirement of ownership still persists however, and if the passenger is not the owner and the carrier is ignorant thereof, it is only liable as a gratuitous bailee, *Cattaraugus Cutlery Co. v. Buffalo Ry.* (1897) 24 App. Div. 267, 48 N. Y. Supp. 451, though a contrary doctrine and one which seems much more reasonable has arisen that ownership is immaterial if the articles in question are technically baggage or through waiver may be classed as such. *Lake Shore etc. R. R. v. Hochstim* (1897) 67 Ill. App. 514. A carrier may by accepting articles as baggage with knowledge that the passenger is not the owner, or by customarily doing so, waive the requirement of ownership and thereby assume an insurer's liability. *Ft. Worth R. R. v. Rosenthal Millinery Co.* (Tex. Civ. App. 1895) 29 S. W. 196. And similarly knowledge or custom may operate to effect a waiver of the fact that the articles are not, strictly, baggage, *Kansas City etc. Ry. v. McGahey* (1897) 63 Ark. 344, 38 S. W. 659. So, sample trunks, though not ordinarily included in the term baggage, *Haines v. Chicago etc. R. R.* (1882) 29 Minn. 160, 12 N. W. 447, may, through waiver, be classed as such. *Salleby v. Central R. R. of N. J.* (1904) 99 App. Div. 163, 90 N. Y. Supp. 1042. The court in the principal case takes judicial notice of the custom of carriers in that state to accept salesmen's sample trunks for carriage as baggage, and concludes therefrom that though they are to be regarded as baggage, yet since the carrier did not know that the passenger was not the owner, it is only liable as gratuitous bailee. It is submitted that the above custom should operate as a waiver of the ownership requirement as well, and that the carrier was therefore under an insurer's liability. *Cf. Ft. Worth R. R. v. Rosenthal Millinery Co., supra.*

CONSTITUTIONAL LAW—TAXATION—FOREIGN CORPORATIONS.—An Illinois corporation engaged in both local and interstate commerce in Texas where it had depots and warehouses was required to pay a franchise tax the amount of which was based on capital stock. *Held*, the tax is invalid. *Looney v. Crane Co.* (1917) 38 Sup. Ct. 85.

Though a state may not impose direct taxation on interstate commerce, *Galveston, Harrisburg, etc. Ry. v. Texas* (1907) 210 U. S. 217, 28 Sup. Ct. 638; *Oklahoma v. Wells, Fargo & Co.* (1911) 223 U. S. 298, 32 Sup. Ct. 218, it may tax intrastate commerce or the privilege

of engaging therein. *Ohio Tax Cases* (1913) 232 U. S. 576, 34 Sup. Ct. 372. Before *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, the Supreme Court seemed to hold that if the subject matter of the tax was within the power of the state, the tax was necessarily valid even though it might to a greater or less extent affect interstate commerce. *Pullman Co. v. Adams* (1903) 189 U. S. 420, 23 Sup. Ct. 494; *Allen v. Pullman Co.* (1903) 191 U. S. 171, 24 Sup. Ct. 39. But after this decision the ruling principle was that if the effect on interstate commerce was sufficiently serious the tax was invalid. *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232; *Ludwig v. Western Union Tel. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280; *Atkinson etc. Ry. v. O'Connor* (1912) 223 U. S. 280, 32 Sup. Ct. 216. Each case was viewed with reference to its own particular facts and definite rules were avoided. See *Baltic Mining Co. v. Massachusetts* (1913) 231 U. S. 68, 34 Sup. Ct. 15; *St. Louis etc. Ry. v. Arkansas* (1914) 235 U. S. 350, 35 Sup. Ct. 99; *Kansas City etc. Ry. v. Kansas* (1916) 240 U. S. 227, 36 Sup. Ct. 261. A domestic corporation engaged in combined local and interstate transportation was held subject to a tax measured by total capital stock, *Kansas City etc. Ry. v. Stiles* (1916) 242 U. S. 111, 37 Sup. Ct. 58, and a foreign corporation engaged in making local and interstate sales within the state was held subject to a tax measured by total capital stock when the statute provided the tax did not exceed two thousand dollars. *Baltic Mining Co. v. Massachusetts, supra*. The instant case shows that there must be some maximum or a tax on foreign corporations measured by total capital stock will be invalid. The opinion of the court seems inconsistent with the reasoning of the former opinions in that it expressly eliminates any question of the degree of interference with interstate commerce. It makes no attempt to point out particular facts which give rise to the decision, as was done in *Baltic Mining Co. v. Massachusetts, supra*, and *St. Louis etc. Ry. v. Arkansas, supra*, but, without distinguishing the character of the business, the nature of the property owned by the respondent within the state, or the measure of the tax, from those elements in *Western Union Tel. Co. v. Kansas, supra*, and the cases following it, the court blindly follows those decisions and lays down the broad proposition that a franchise tax on any foreign corporation engaged in local and interstate business cannot be measured by the total capital stock with no maximum limitation, because such tax would burden interstate commerce and would take property without due process of law.

CONTRACTS—AWARD AND ARBITRATION—EFFECT OF FRAUD.—The contract between the plaintiff and the defendant, a contractor, provided that the plaintiff's chief engineer was to be the "final umpire in all questions arising under the contract." The grand division engineer of the plaintiff, a brother-in-law of the defendant, increased to a large extent the estimates of the division engineer, and fraudulently managed to have the chief engineer, who was ignorant of the increases, approve them. The plaintiff paid the defendant and on discovering the fraud sued for the amount overpaid. *Held*, Though it was impossible to charge the defendant with fraud with sufficient directness, yet the plaintiff could recover the amount overpaid, since the award of the chief engineer having been procured through fraud, was not binding. *Atchison, T. & S. F. Ry. v. West* (Cal. 1917) 167 Pac. 868.

Although the courts have finally come to allow awards of arbitrators

where the parties have agreed that the award shall be final. *Cervien v. Erickson Construction Co.* (Wash. 1917.) 162 Pac. 567, apparently influenced by considerations of expense and expedition, yet the award is only *prima facie* correct and is subject to impeachment. However, an honest mistake of judgment, *Vincent v. German Ins. Co.* (1903) 120 Iowa 272, 94 N. W. 458, fact, *Patton v. Garrett* (1895) 116 N. C. 847, 21 S. E. 679, or even of law, *Stone v. Baldwin* (1907) 226 Ill. 338, 80 N. E. 890, will not generally furnish sufficient basis for over-throwing an award, since that would be substituting the court's judgment for that of the arbitrator's. But, where the arbitrator was found to be a close relative, *Stinson v. Davis* (Ky. 1899) 50 S. W. 550, or a stockholder of one of the parties, *Milner v. Georgia R. R. & Bank Co.* (1848) 4 Ga. 385, the award was impeached. Fraud, *Elledge v. Polk* (Miss 1909) 48 So. 241, or such gross mistake as to lead to the inference of fraud, *Cornell & Co. v. Steele* (1909) 109 Va. 589, 64 S. E. 1038, will certainly cause the court to interfere. It is not necessary that the arbitrator himself be guilty of fraud or bad faith; it is enough that he is fraudulently deceived. *Cornell & Co. v. Steele, supra*; *Forrest City Box Co. v. Sims* (C. C. A. 1913) 208 Fed. 109. Since the reason for setting aside the award is the obvious injustice otherwise done one of the parties it appears that it is immaterial who is responsible for the deception of the arbitrator and that the court in the principal case properly allowed the plaintiff to recover the sum overpaid.

CONTRACTS.—BREACH OF CONTRACT TO LEND MONEY.—MEASURE OF DAMAGES.—The defendant, with full knowledge of the plaintiff's financial condition, agreed to make advances to the plaintiff in consideration of the plaintiff depositing with him certain securities. The plaintiff deposited the securities, but the defendant refused to loan the money, and the plaintiff consequently became insolvent. *Held*, the plaintiff was entitled to recover special damages. *Murphy v. Hanna* (N. D. 1917) 164 N. W. 32.

The normal rule in cases of breach of a contract to loan money is that unless special damages are alleged and proved recovery is limited to nominal damages; *Gooden v. Moses Bros.* (1892) 99 Ala. 230, 13 So. 765; *Lowe v. Turpie* (1896) 147 Ind. 652, 675, 47 N. E. 150; the reason for the rule being that, although the plaintiff would have received a certain sum of money were the contract performed, he would immediately have been under a duty to return a similar amount. 2 Sedgwick, Damages (9th ed.) § 622. Since under ordinary circumstances money is always procurable in the open market at the legal rate, where the breach is of an agreement to lend money for a particular length of time, the measure of damages is the difference between the interest at the contract rate and at the rate, not exceeding that fixed by law, which the borrower had to pay in the open market, see *McGee v. Wineholt* (1901) 23 Wash. 748, 63 Pac. 571, or else the money necessarily expended in procuring the loan elsewhere. *Holt v. United Security Life Ins. & Tr. Co.* (1909) 76 N. J. L. 585, 72 Atl. 301; *Bohemian-American etc. Ass'n v. Northern Bank of N. Y.* (Sup. Ct. 1909) 120 N. Y. Supp. 134. But where the money cannot be obtained elsewhere or the plaintiff has been deprived of the opportunity of obtaining it, and the money was to be used for a special purpose known at the time to the lender, the injured party may have compensation for the loss which he has sustained by reason of the breach, so far as that loss was, or ought to have been within the con-

templation of the parties. *Manchester & Oldham Bank v. Cook* (1883) 49 L. T. (N. S.) 674; *Heddin v. Schneblin* (1907) 126 Mo. App. 478, 104 S. W. 887; *cf.* 14 Columbia Law Rev. 154; but *cf.* *Bixby-Thierson Lumber Co. v. Evans* (1910) 167 Ala. 431, 52 So. 843, second appeal (1911) 174 Ala. 571, 57 So. 39. Since it appears that the plaintiff's resultant damages were within the contemplation of the parties at the time of making the agreement, and that the plaintiff was precluded from obtaining a loan elsewhere, the decision seems sound and in accord with the weight of authority.

CONTRACTS—FORBEARANCE TO RESCIND AS CONSIDERATION FOR THIRD PARTY'S PROMISE.—Defendant, whose daughter was engaged to marry an Italian Count, promised, in consideration of the marriage, to pay the daughter \$2,500 annually. The marriage took place, and plaintiff sues as assignee for unpaid installments. *Held*, that the daughter, being a beneficiary, by acting in reliance upon the promise, adopted it and thereby became a joint promisee; that the joint forbearance to rescind the engagement contract was sufficient consideration for defendant's promise. *De Cicco v. Schweizer* (1917) 221 N. Y. 431, 117 N. E. 807.

Since parties to an executory contract have a legal right to rescind by mutual consent, Anson, *Contracts* (8th Am. ed.) 104; see *McCreery v. Day* (1890) 119 N. Y. 1, 23 N. E. 198, it would seem that their joint forbearance to rescind involves the surrender of a legal right which constitutes consideration for a third party's promise. Some jurists have suggested that this is true even of forbearance by one party alone to offer or accept rescission. Anson, *op. cit.* 110; *cf.* Williston, "Successive Promises of the Same Performance" 8 *Harvard Law Rev.* 34 *et seq.* It is doubtful, in the principal case, if such forbearance was the consideration requested. The chief difficulty, however, is in finding that the daughter was a joint promisee. The court relied upon the theory, peculiar to New York, that a beneficiary acquires a right to sue by adopting the promise. *Gifford v. Corrigan* (1889) 117 N. Y. 257, 22 N. E. 756; *Clark v. Howard* (1896) 150 N. Y. 232, 44 N. E. 695. But a beneficiary is not a joint promisee, and allowing him to sue upon the contract does not make him such. The New York courts have hitherto invoked the adoption theory only to explain the beneficiary's right of action. see *Durnherr v. Rau* (1892) 135 N. Y. 219, 32 N. E. 49, and there seems to be no justification for extending its application. It should be noted, moreover, that this doctrine is confined to the group of cases following *Lawrence v. Fox* (1859) 20 N. Y. 268, in which the promisor assumes an obligation of the promisee to the beneficiary. See *Litchfield v. Flint* (1887) 104 N. Y. 543, 11 N. E. 58; *cf.* *Todd v. Weber* (1884) 95 N. Y. 181; *Little v. Banks* (1881) 85 N. Y. 258. Therefore, while the result reached in the principal case may be desirable, the court's reasoning is unsound, and the fiction of adoption was carried to an extreme which, if the decision is followed, will produce absurd consequences. The court apparently felt the weakness of its position, for it supported its decision also upon the ground that in marriage settlements consideration is of minor importance. See 7 *Columbia Law Rev.* 203.

CRIMINAL LAW—FALSE PRETENSES—CONSTRUCTION OF STATUTE—WHAT CONSTITUTES "VALUABLE THING".—Under a statute declaring that a person shall be guilty of cheating who fraudulently obtains from

another "any chose in action, money, goods, wares, chattels, effects, or other valuable thing whatever", nothing being said of obtaining a signature to an instrument. *held*, that fraudulently obtaining a promissory note from the maker thereof comes within the meaning of "valuable thing". *Knepper v. People* (Colo. 1917) 167 Pac. 779.

It is a general rule that penal statutes should be construed in favor of the prisoner; but this rule does not require that a fantastic construction should be given which would defeat the real intention of the legislature. A note complete on its face in the hands of the maker is technically speaking no note at all. Norton, Bills & Notes (4th ed.) § 35. It is not an obligation nor a valuable thing. But no sooner is it delivered than it becomes a chose in action and represents a liability against the maker. Furthermore its negotiation to a holder in due course deprives the maker even of the defense of non-delivery. Neg. Instr. Law § 16 (N. Y. § 35). In view of this it has been held that a note obtained by false pretenses from the maker comes within the terms "property", *People v. Skidmore* (1899) 123 Cal. 267, 55 Pac. 984; but *cf. People v. Cassou* (1915) 27 Cal. App. 23, 148 Pac. 810; *Regina v. Danger* (1857) 7 Cox C. C. 303, and "valuable thing". *State v. Thatcher* (1872) 35 N. J. L. 445; see *State v. Porter* (1881) 75 Mo. 171; *cf. Queen v. Gordon* (1889) 23 Q. B. D. 354. Since the substance of the offense consists in obtaining a valuable thing, a distinction ought to be made between negotiable and non-negotiable notes, as an action on the latter will of necessity be subject to an equitable defense. *Robinson v. State* (1890) 53 N. J. L. 41, 20 Atl. 753; *contra, State v. Porter, supra*, 177. Similarly, the note of an infant maker should not be considered as embraced within any of the foregoing terms. See *Commonwealth v. Lancaster* (Mass. 1835) Thach. Cr. Cas. 428. But the fact that the maker is insolvent or the fact that the note has not been negotiated by the prisoner, have properly been deemed insufficient to warrant an acquittal. See *Holton v. State* (1899) 109 Ga. 127, 34 S. E. 358. Since the purpose of the statute under consideration is to suppress cheating and discourage the making of false representations, whether or not the prosecutor in fact sustains any pecuniary loss, see *Commonwealth v. Ferguson* (1909) 135 Ky. 32, 121 S. W. 967, the interpretation put upon it seems to effectuate it, and a contrary construction would put an artificial restriction upon its operation.

DAMAGES—LIQUIDATED DAMAGES—EFFECT OF DELAY CAUSED BY OWNER IN BUILDING CONTRACT.—A contract provided for the wrecking of a building in 30 days. The architect was empowered to certify an extension of time, on application by the contractor, for delays caused by the owner and certain other causes. There was a delay of 7 days in vacating the building, and the contractor did not complete the wrecking until 37 days thereafter. The contract provided for liquidated damages at \$25 a day for each day's delay. *Held*, since the contract provided for an extension of time, the initial delay of the owner did not destroy the provision for liquidated damages; and as no extension had been applied for, plaintiff was entitled to recover for the delay of the contractor. *Trauts Realty Corp. v. Casualty Co. of America* (Sup. Ct. App. Term 1917) 166 N. Y. Supp. 807.

Where a contract provides that certain work shall be completed within a stipulated time, and contains a provision for liquidated damages for delay, the obligation is annulled if the owner himself con-

tributes to the delay, and he is limited to actual damages. *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.* (1910) 199 N. Y. 479, 93 N. E. 81; *United States v. United Eng. Co.* (1914) 234 U. S. 236, 34 Sup. Ct. 843. This is on the theory that the time is set at large by the owner's act; for the prompt performance of the work is the condition on which the contractor's liability depends, and when the obligee himself obstructs the performance of a condition, it is excused. 3 Halsbury, Laws of England, § 511. But the owner generally inserts a provision in the contract giving the architect power to certify an extension of time in certain cases; by virtue of which the effect of a delay caused by the owner operates merely as an extension of the time for performance, and a new time is substituted for the old. *Laidlaw-Dunn-Gordon Co. v. United States* (U. S. 1912) 47 Ct. Cl. 271; *Paddock v. Stout* (1887) 121 Ill. 571, 578, 13 N. E. 182. The other provisions of the contract remain unaffected, and consequently the builder is liable in liquidated damages, but the period of delay caused by the owner is deducted from the total delay. *Van Buskirk v. Board of Education* (1910) 78 N. J. L. 650, 75 Atl. 909; *Cook & Laurie v. Denis* (1909) 124 La. 161, 49 So. 1014. Although the courts are not disposed, in the absence of this provision, to apportion the delay when it is caused by both parties, *Jefferson Hotel Co. v. Brumbaugh* (C. C. A. 1909) 168 Fed. 867, 874; *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, *supra* 487, yet if it can be done with reasonable certainty, and the contract provides for allowing extensions, the courts will undertake to do so. *Schmulbach v. Caldwell* (C. C. A. 1912) 196 Fed. 16. But in such case the burden of proving for what days credit should be allowed rests on the contractor. *Schmulbach v. Caldwell*, *supra*. In the instant case, the contractor's time for performance was extended 7 days by the delay of the owner, but he was rightly held liable in liquidated damages for his own additional unexcused delay.

EVIDENCE—PHOTOGRAPHS—HYPOTHETICAL SITUATION.—In an action for personal injuries, the defense offered in evidence, in order to prove its theory of the case, several photographs of a man standing in various assumed positions on top of the tank where the plaintiff was injured. *Held*, the evidence was inadmissible. *Colonial Refining Co. v. Lathrop* (Okla. 1917) 166 Pac. 747.

Maps, diagrams or photographs are admitted to illustrate the testimony of a witness as aids to the jury in applying the evidence, *State v. Hersom* (1897) 90 Me. 273, 38 Atl. 160; *Western Gas Constr. Co. v. Danner* (C. C. A. 1899) 97 Fed. 882, their admission for this purpose largely lying within the discretion of the trial court. *Mauch v. Hartford* (1901) 112 Wis. 40, 87 N. W. 816. They are also admitted as direct evidence of the facts in issue. *Livermore etc. Co. v. Union etc. Co.* (1900) 105 Tenn. 187, 58 S. W. 270; *Louisville & N. R. R. v. Brown* (1908) 127 Ky. 732, 106 S. W. 795; see *People v. Loper* (1910) 159 Cal. 6, 112 Pac. 720. A photograph itself, however, is a nonentity if it is not vouched for by a witness as a true representation of the conditions portrayed. See *Baustian v. Young* (1899) 152 Mo. 317, 53 S. W. 921; 3 Chamberlayne, Evidence, § 1760. Being merely another than verbal expression of somebody's testimony, a photograph will not be admitted if through it a witness testifies to an irrelevant fact, *McClurg v. Brenton* (1904) 123 Iowa 368, 98 N. W. 881, and, if the photograph tends to prejudice the interests of one of the parties,

it is not admitted. *Guhl v. Whitcomb* (1901) 109 Wis. 69, 85 N. W. 142. The question whether a picture is misleading would seem to be a question for the jury just as the credibility of any other testimony. 1 Wigmore, Evidence, § 792; *contra*, *Ortiz v. State* (1892) 30 Fla. 256, 11 So. 611. The decision in the principal case, that a photograph of a hypothetical situation is inadmissible, is supported by the authorities. *Babb v. Oxford Paper Co.* (1904) 99 Me. 298, 59 Atl. 290; *Stewart v. St. Paul City Ry.* (1899) 78 Minn. 110, 80 N. W. 853; *Wylde v. Paterson* (1915) 31 N. D. 282, 153 N. W. 630. The reason for excluding the evidence is that it is irrelevant since it does not help to determine any fact in issue but simply gives the party's hypothesis as to how the facts occurred. It is submitted that the holding in the principal case is correct.

GIFT—ENGAGEMENT RING—CONDITION SUBSEQUENT.—The defendant, having broken her contract to marry the plaintiff, refused to return the engagement ring. *Held*, the plaintiff could recover the ring. *Jacobs v. Davis* (1917) 2 K. B. 532.

Where, under the circumstances of the principal case, there had been no expression of the intention of the parties, it is submitted that the most likely inference is that there was an absolute gift. See *Stromberg v. Rubinstein* (1897) 19 Misc. 647, 44 N. Y. Supp. 405. But, on the basis of the assumption that in the great majority of such cases the ring is returned, it might well be argued that such was the intention of the parties. If this is the proper inference of fact, there seems no reason of policy why the intention should not be carried out. But it is difficult to find a legal basis for the recovery of the ring. The principal case refers to it as a pledge to bind the contract, which, if the recipient breaks the agreement, she must return. This view seems to be in accord with the history of betrothal gifts. *Cf.* Pollock & Maitland, *History of English Law* (2nd ed.) 366. There is, however, only an analogy between this case and what is known in modern law as a pledge. And moreover, under this construction, the plaintiff could recover even if he had broken the contract, provided he paid damages for the breach; *cf.* Goodeve, *Personal Property*, (5th ed.) 28, which proves too much since it seems probable from the scant authorities that unless the defendant has broken the contract, the plaintiff would not recover. *Cf.* *Robinson v. Cumming* (1742) 2 Atk. *409; 1 Fonblanque, *Equity* (3rd ed.) c. 6, § 15. A similar difficulty arises if the theory of ordinary bailment is adopted. Another basis for recovery is suggested in a case where money had been advanced by the plaintiff to the defendant to purchase a trousseau. It was held that upon the defendant's breach of the contract to marry, plaintiff could recover in assumption. *Williamson v. Johnson* (1890) 62 Vt. 378, 20 Atl. 279. While the reasoning in this case is confused, the basis of the opinion seems to be that of conditional gift. It has been held that there cannot be a gift of personalty on condition subsequent. *Irish v. Nutting* (N. Y. 1867) 47 Barb. 370. But there seems no reason in the nature of things why there could not be such a gift, and there is authority for holding it valid. *Blanchard v. Sheldon* (1871) 43 Vt. 512; Childs, *Personal Property* § 228; Goodeve, *supra* 85; Thornton, *Gifts & Advancements* § 94. It would seem that this theory affords the most satisfactory basis for an action at law.

INTERNATIONAL LAW—SOVEREIGN'S IMMUNITY FROM SUIT—WAIVER.—The Kingdom of Roumania brought suit against the defendant trust company to recover a deposit made by it therein. The defendant moved to interplead a third party who sued it for the same deposit. *Held*, that the Kingdom of Roumania, having voluntarily brought suit, waived its immunity as a sovereign power and was subject to an interpleader. *Kingdom of Roumania v. Guaranty Trust Co. of N. Y.* (D. C. S. D. N. Y. 1917) 244 Fed. 195. Reversed but not yet reported. (C. C. A.) See 58 N. Y. L. J. 1187.

It is well established that an independent state may neither be sued in the courts of another state, *DeHaber v. Queen of Portugal* (1851) 17 Q. B. 196, nor its property seized or made the subject of judicial process. *Vavasour v. Krupp* (1878) 9 Ch. D. 351; *Schooner Exchange v. M'Faddon* (1812) 11 U. S. 116; *Parlement Belge* (1880) 42 L. T. R. (N. S.) 273. Nor may a sovereign be sued in another state, though a citizen of that state, for acts done in his sovereign capacity in his own country. *Duke of Brunswick v. King of Hanover* (1848) 2 H. L. C. *1. And even where a sovereign residing in another state has entered into a contract under an assumed name as a private individual, he will nevertheless be allowed to set up his sovereignty as a defense to a suit brought against him on that contract. *Mighell v. Sultan of Johore* [1894] 1 Q. B. D. 149. However, a sovereign state may avail itself of the courts of a foreign jurisdiction to redress a wrong done it in respect to its property. *Emperor of Austria v. Day & Kossuth* (1861) 3 DeG., F. & J. *217, *238. But where a state has submitted to the court's jurisdiction it may not subsequently raise an objection to the jurisdiction, *Richardson v. Fajardo Sugar Co.* (1916) 241 U. S. 44, 36 Sup. Ct. 476, and it must conform to the rules of practice of the court. *King of Spain v. Hullet & Widder* (1833) 1 Cl. & F. 333. So a sovereign is subject to a cross bill, *Rothschild v. Queen of Portugal* (1839) 3 Y. & C. 94, and must, if required, give security for costs. Moreover, the defendant in an action begun by a sovereign may assert a lien, *United States v. Wilder* (1838) 28 Fed. Cas. No. 16694, or contract rights, *United States of America v. Prioleau* (1865) 2 Hem. & M. 559, which he has acquired with regard to the property claimed. While it is suggested that a counterclaim might be allowed, see *Strousberg v. Republic of Costa Rica* (1880) 44 L. T. R. (N. S.) 199, it is settled that no affirmative judgment may be rendered against the sovereign. *United States v. Eckford* (1867) 173 U. S. 484; *South African Republic v. Compagnie Franco-Belge etc.* [1898] 1 Ch. 190. In all the cases where the defendant has been allowed to assert rights, there would seem to have been a waiver by the sovereignty of its immunity from suit. And as illustrated by the cases involving counterclaims, the courts will protect rights which have not been waived. In the principal case it seems clear that in bringing its action the Kingdom of Roumania did not in any way waive its immunity from suit by the party sought to be impleaded and the interpleader should not be allowed.

LARCENY—EVIDENCE OF POSSESSION—UNIDENTIFIED GOODS.—In a prosecution for larceny, evidence that the defendants when arrested had in their possession various articles of jewelry not identified as the property of the prosecuting witness was *held* admissible as tending to show property in the hands of the accused subsequent to the alleged larceny. *Commonwealth v. Coyne et al.* (Mass. 1917) 117 N. E. 337.

As a general rule, evidence of other crimes committed by the defendant to prove the particular offense for which he is being tried is inadmissible on the ground that the admission of such evidence would unduly influence the jury against him. *People v. Molineux* (1901) 168 N. Y. 264, 61 N. E. 286; 2 Columbia Law Rev. 39. However, evidence of a former offense is admissible to prove the specific crime when it tends to show motive, *Thompson v. United States* (C. C. A. 1906) 144 Fed. 14, or intent, *Mitchell v. State* (1904) 140 Ala. 118, 37 So. 76, or the identity of the accused, *People v. Jennings* (1911) 252 Ill. 534, 96 N. E. 1077, or a common scheme embracing the commission of a series of crimes, *Commonwealth v. Snell* (1905) 189 Mass. 12, 75 N. E. 75, or absence of mistake or accident. *State v. Hyde* (1911) 234 Mo. 200, 233, 136 S. W. 316. On the other hand, evidence that the defendant had recent possession of the property for the larceny of which he is being tried is always admissible. 1 Wigmore, Evidence, § 152. Moreover there is a division of authority as to the effect of such evidence, Wigmore, *op. cit.* § 2513, some jurisdictions holding that it raises a presumption in law of the guilt of the defendant, *State v. Court* (1910) 225 Mo. 609, 125 S. W. 451, and others holding that it is such evidence from which the jury might infer the guilt of the accused, if he cannot explain possession. *Thompson v. State* (1909) 58 Fla. 106, 50 So. 507. Moreover, evidence is admitted to show that the defendant had no money before the alleged larceny and an unexplained sum of money after the specific offense in question, *State v. Bruce* (1890) 106 N. C. 793, 11 S. E. 475; *State v. Thompson* (1893) 87 Iowa 670, 54 N. W. 1077; *People v. Kelly* (1901) 132 Cal. 430, 64 Pac. 563; *contra Williams v. United States* (1897) 168 U. S. 382, 18 Sup. Ct. 92, on the ground that such a sudden change of circumstances is a suspicious fact which the jury has a right to consider in connection with other evidence which points strongly to the defendant's guilt. See *Commonwealth v. Montgomery* (1846) 52 Mass. 534. The court in the principal case apparently admitted the evidence in question on this ground. But it would seem that the decision is a further encroachment on the general rule that evidence of other crimes is inadmissible. For if any inference of guilt can be drawn from the testimony admitted, it would seem to be that the defendant had gained possession of the unidentified collection of jewelry in the commission of other larcenies than the one charged. There would seem to be no such inference as is drawn from the sudden possession of money since money might well be the proceeds of a recent larceny. It is submitted that the evidence in the principal case should have been excluded.

NEGLIGENCE—RECOVERY BY INVITED GUEST IN AUTOMOBILE FOR PERSONAL INJURY.—The plaintiff, having been invited by the defendant to ride in her automobile, while a guest in the latter's home, was injured in an accident due to the negligence of the chauffeur. In a tort action for damages, *held*, in the absence of evidence of gross negligence on the part of the defendant, the plaintiff could not recover. *Massaletti v. Fitzroy* (Mass. 1917). 56 Banker & Tradesman 875.

The courts have by a number of decisions stated that the status of one invited to take an automobile ride, is that of an invitee for social purposes, towards whom the owner owes the duty of ordinary care. Some courts have declared that while the host is not responsible for acts of non-feasance, *Plummer v. Dill* (1892) 156 Mass. 426, 31 N. E. 128; but *cf. Davis v. Central Congregational Society* (1880) 129

Mass. 367, he is responsible for acts of ordinary mis-feasance; *Pigeon v. Lane* (1907) 80 Conn. 237, 67 Atl. 886; others that he is liable only for acts of gross negligence. *Cf. Southcote v. Stanley* (1856) 1 H. & N. 247. There is, however, general acquiescence in the view that the passenger may recover for an injury caused by reckless driving. *Beard v. Klusmeier* (1914) 158 Ky. 153, 164 S. W. 319; *Fitzjarrell v. Boyd* (1914) 123 Md. 497, 504, 91 Atl. 547; see *Mayberry v. Sivey* (1877) 18 Kan. 291. Since ultimately each case must rest on its own facts, these distinctions are more technical than real. But in the jurisdiction of the principal case, gross negligence is akin to intentional misconduct, differing not merely in degree, but also in kind from ordinary negligence. *Galbraith v. West End Street Ry.* (1896) 165 Mass. 572, 43 N. E. 501. Hence the decision seems to imply that the owner is liable only for intentional injury. The court relied principally on the case of *West v. Poor* (1907) 196 Mass. 183, 81 N. E. 960 where a trespassing child who had been permitted to ride on a milk wagon by the acquiescence of the milkman, was not allowed to recover in the absence of showing "gross negligence". Since in the instant case the plaintiff was expressly invited to ride, her position is not at all analogous to that of the child in *West v. Poor*, *supra*, and the court in relying on the earlier decision reached a result which is against the weight of authority and not to be commended.

PUBLIC OFFICERS—CLERKS OF COURT—LIMITS OF LIABILITY ON OFFICIAL BOND—PRIVATE FUNDS.—Defendant clerk, by order of court, received money tendered into court by plaintiff and deposited it in a bank which subsequently failed. In an action on his official bond, *held*, he was liable therefor, even though the funds were private and not public. *People v. McGrath* (Ill. 1917) 117 N. E. 74.

If money is tendered to the clerk without court order while suit is pending, it is not received by him in his official capacity, *Commercial etc. Co. v. Peck* (1897) 53 Neb. 204, 73 N. W. 452, and no action on his bond may be maintained; *People v. Cobb* (1897) 10 Colo. App. 478, 51 Pac. 523; but if paid in pursuance of a court order, he receives it officially and the action will lie. *United States v. Howard* (1902) 184 U. S. 676, 22 Sup. Ct. 543. The limits of liability on the bond are unsettled as in the case of every public officer under bond. Throop, *Public Officers* §§ 221-229; 9 Columbia Law Rev. 639. Following the weight of authority in the case of other public officials, some courts have held court clerks absolutely liable for all funds paid to them in their official capacity. *Northern Pac. Ry. v. Owens* (1902) 86 Minn. 188, 90 N. W. 371; *Smith v. Patton* (1902) 131 N. C. 396, 42 S. E. 849. On the other hand, there is a persistent common law view which regards their liability as solely that of a bailee. Story, *Bailments* § 620, and courts following this view have not permitted suits on the bond in cases like the principal case. *Wilson v. People* (1893) 19 Colo. 199, 34 Pac. 944; *cf. Aurentz v. Ponter* (1867) 56 Pa. 115. The confusion arises from the fact that court clerks handle both public and private moneys. Fees, costs and fines collected by them are public moneys which, because of considerations of policy, have been protected. 9 Columbia Law Rev. 639. The reasons, it is suggested, are similar to those for the rule, in some jurisdictions, that public funds are entitled to a preference in the event of insolvency of banks. *Matter of Carnegie Trust Co.* (1912) 206 N. Y. 390, 99 N. E. 1096; *contra, Phillips v. Gillis* (1916) 98 Kan. 383, 158 Pac. 23. But money tendered into

court to await judgment is not public money. *Branch v. United States* (U. S. 1876) 12 Ct. Cl. 281, 289; see *People ex rel. Nash v. Faulkner* (1887) 107 N. Y. 477, 14 N. E. 415; *Gartley v. People* (1901) 28 Colo. 227, 64 Pac. 208. It cannot be expended for public uses and it ought no more be protected than any other private property held under judicial process to await the outcome of the trial. In such a case the officer's liability is that of a bailee and not an insurer. *Browning v. Hanford* (N. Y. 1843) 5 Hill 588; see *Norris v. McCanna* (1886) 29 Fed. 757. There is, however, authority in support of the principal case depending upon a strict interpretation of the condition of the bond requiring the clerk to "pay over all moneys that may come into his hands by virtue of his office". *Morgan v. Long* (1870) 29 Iowa 434; *Northern Pac. Ry. v. Owens*, *supra*.

PUBLIC OFFICERS—COMMENCEMENT OF TERM.—The petitioner for a writ of mandamus alleged that he had been elected judge. Because of an error in the canvass his commission was not issued until three weeks later. In the meanwhile the governor of Illinois signed a bill increasing the salary of judges. There was no time mentioned in the statutes at which the term of office should begin. *Held*, the petitioner was not entitled to the increase, since it was granted within his term of office, and hence within the constitutional provision that salaries shall not be changed during an incumbent's continuance in office. *People ex rel. Holdom v. Sweitzer* (Ill. 1917) 117 N. E. 625.

It is usual for statutes creating offices to designate the time when the term shall begin. In the absence of such provision, the general view is, that the term of office starts from the date of the election. *Macoy v. Curtis* (1880) 14 S. C. 367. Where there is no fraud, an error which does not vary the result, will not invalidate an election, *Town of Grove v. Haskell* (1909) 24 Okla. 707, 104 Pac. 56; *State ex rel. Cole v. Chapman* (1878) 44 Conn. 595, 601, see *Mechem*, Public Officers, § 184, and since the candidate who receives the highest number of votes is the one elected, in spite of an erroneous certificate issued to his opponent, such certificate being only *prima facie* evidence of title to the office, *State ex rel. Waymire v. Shay* (1884) 101 Ind. 36; *Wicks v. Jones* (1862) 20 Cal. 50, it seems to follow that the election is determined immediately at the close of the voting. The effect of a commission is merely to give notice to the person elected of such fact, and he can validly take office without ever receiving such notification. *Shuck v. State ex rel. Cope* (1893) 136 Ind. 63, 35 N. E. 993. Hence, because the law for the increase was passed after the date of election it would seem that the court reached the proper conclusion in denying the petitioner's claim for the increased salary.

SALES—ACCEPTANCE—PERISHABLE GOODS.—The plaintiff's assignor shipped dressed turkeys of a different description from those ordered by the defendant. The latter telegraphed the plaintiff of the non-compliance stating that he would not use the goods and, before he could receive a reply, sold the turkeys. In an action for the purchase price, it was *held* that the trial court was in error in withdrawing the determination of the fact of acceptance from the jury. *White v. Schweitzer* (1917) 221 N. Y. 461, 117 N. E. 941.

Although in a sale of unascertained goods, in the absence of special agreement, the title will pass upon a delivery to the carrier for the benefit of the vendee, Benjamin, *Sales* (5th ed.) 350, it will not so pass

when the goods delivered do not comply with the order. *Aultman, Miller & Co. v. Clifford* (1893) 55 Minn. 159, 56 N. W. 593. But the vendee is under the duty to return the goods or to notify the vendor of his refusal to accept, *Reed v. Randall* (1874) 29 N. Y. 358, and any act of ownership after the goods are delivered will be taken to indicate an acceptance binding the vendee to a payment of the purchase price, *Brown v. Foster* (1888) 108 N. Y. 387, 15 N. E. 608; *Thompson Machine etc. Co. v. Graves* (Conn. 1916) 98 Atl. 331; Sale of Goods Act (1893) § 35; Uniform Sales Act, § 48, but not where the act of ownership occurs before the receipt of the goods, see *Morton v. Tibbett* (1850) 19 L. J. C. L. 382, or if the acceptance is induced by fraud or misrepresentation. *Meyers v. Menifee & Co.* (1902) 30 Tex. Civ. App. 28, 68 S. W. 540. However, if the goods are to be delivered by installments, an acceptance of one installment does not preclude the right to reject the subsequent installments, *Schwartz v. Hirsch* (1907) 56 Misc. 618, 107 N. Y. Supp. 796, although a failure to comply with the conditions of one installment does not necessarily give the vendee the right to treat the contract as terminated. *Ellison Son & Co. v. Flat Top etc. Co.* (1911) 69 W. Va. 380, 71 S. E. 391. But when the goods are of a perishable nature, as in the instant case, there is an exception to the general rule and if the vendee communicates his rejection and, receiving no instructions, notifies the vendor of his intention to sell in order to prevent a total loss, the act of ownership in selling will not constitute an acceptance. *Descalzi Fruit Co. v. Sweet & Son* (1910) 30 R. I. 320, 75 Atl. 308; see *Richardson v. Levi* (N. Y. 1893) 69 Hun 432. Since a jury could have found in the instant case that the defendant had exercised ownership over the shipment without exerting every means to communicate, the holding is sound. The defendant may recover, however, for a breach of warranty of quality. *Burdick, Sales* (3rd ed.) 156 *et seq.*

STATUTE OF LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION.—

Premiums under a twelve-months' liability policy were based upon the estimated compensation to be paid by defendant insured to his employees during that period. Should the actual compensation exceed the estimated amount, an additional premium was to become due. Defendant, in violation of his contract, refused to allow plaintiff to inspect his books to ascertain actual compensation paid. In an action to recover additional premiums, defendant pleaded the Statute of Limitations. Plaintiff demurred, on the ground of fraudulent concealment of the cause of action. *Held*, the action was barred. *Fidelity & Casualty Co. of N. Y. v. Jasper Furniture Co.* (Ind. 1917) 117 N. E. 258.

The generally accepted rule is that fraudulent concealment of a cause of action tolls the Statute of Limitations, both at law and in equity, until after discovery. 2 Wood, Limitations (4th ed.) § 276f (1); see 10 Columbia Law Rev. 778. In Indiana this rule is statutory. *Burns' Ann. Ind. Stat., Rev. 1914*, § 302. To constitute fraudulent concealment there must be positive fraud. *Jackson v. Jackson* (1897) 149 Ind. 238, 47 N. E. 963; *Gunton v. Hughes* (1899) 79 Ill. App. 661. Mere silence is insufficient. *Despeaux v. Penna. R. R.* (C. C. 1898) 87 Fed. 794; *Glover v. National Bank of Commerce* (N. Y. 1913) 156 App. Div. 247, 141 N. Y. Supp. 409; but *cf. Allen v. Conklin* (1897) 112 Mich. 74, 70 N. W. 339. Moreover, it is essential that the plaintiff be misled as to the existence of a cause of action. *Sanborn v. Gale*

(1894) 162 Mass. 412, 38 N. E. 710. Hence, if he is reasonably put upon inquiry, *Ater v. Smith* (1910) 245 Ill. 57, 91 N. E. 776, or if the existence of a cause of action is discoverable by the diligent use of means at his command, *Wood v. Carpenter* (1879) 101 U. S. 135; *Moore v. Boyd* (1887) 74 Cal. 167, 15 Pac. 670, he is chargeable with knowledge, and under such circumstances, even a willful falsehood will not toll the statute. *Mereness v. First Nat'l. Bank* (1900) 112 Iowa 11, 83 N. W. 711; *Graham v. Stanton* (1901) 177 Mass. 321, 58 N. E. 1023. In the principal case there was no fraud; the plaintiff was not deceived. He was reasonably put upon inquiry, and his mere inability to obtain evidence should not excuse him. Cf. *Sanborn v. Gale*, *supra*. Hence, the court held rightly that the defendant's conduct, although a breach of contract, did not constitute fraudulent concealment of the plaintiff's cause of action.

TAXATION-FEDERAL INCOME TAX-ALIMONY.—The defendant in error obtained a divorce from her husband who was ordered to pay her \$3,000 a month alimony. *Held*, the payments to her did not constitute income taxable under the Federal Income Tax Law of 1913, 38 Stat. 100. *Gould v. Gould* (1917) 38 Sup. Ct. 53.

The various definitions of income given by economists do not aid much in the determination of whether alimony is income since the legal and economic conceptions of income are totally different. Kennan, *Income Taxation 1, et seq.* The tendency in law has been to restrict the term to wealth accruing from certain limited sources. Thus, a typical American definition of income is "the gain which proceeds from property, labor or business". 2 Bouvier, *Law Dict.* (Rawles ed.), 1527; cf. *Gray v. Darlington* (1872) 82 U. S. 63; *Thorn v. DeBreteuil* (1903) 86 App. Div. 405, 83 N. Y. Supp. 849. The definition of taxable income contained in the Federal Income Tax Law of 1913, 38 Stat. 167, is substantially like that contained in the present law, Act Sept. 8, 1916, c. 463 § 2, 6 U. S. Comp. Stat. (1916) § 6336b, and though greatly elaborated, it differs little from the one given above unless the clause to the effect that income is "gains, or profits and income derived from any source whatever" should extend its meaning. It would seem that it did not have that effect, since "gains" when used in connection with "profits" is given the restricted meaning of gains from business, Frost, *Federal Income Tax* § 16, and the use of the word income in this clause throws us back on our former definition of income. Moreover, admitting the construction to be doubtful the more restricted meaning should be given, for a statute imposing a tax is to be construed most strongly against the government. See *American Net and Twine Co. v. Worthington* (1891) 141 U. S. 468, 12 Sup. Ct. 55. Alimony is an allowance which the husband is compelled to pay a wife divorced or living apart from him for the wife's maintenance. *Romaine v. Chauncey* (1892) 129 N. Y. 566, 29 N. E. 826. Since the value of this support could not be considered a part of the wife's income while she lived with her husband, it would seem to follow that this pecuniary substitute which the law allows to her by reason of her husband's failure to perform his marital obligations should likewise not be treated as income. But whether this is logically sound or not, it is clear that alimony is not revenue derived from property, labor, or business of the recipient and hence it is not embraced in the legal definition of income. It would seem, therefore, that the principal case is sound.

TRIALS—ARGUMENT OF COUNSEL—RIGHT OF PLAINTIFF TO RECOVER FROM THIRD PARTY.—In an action by a motorman for injuries against the owner of a truck with which his car had collided, the complaint alleged that the plaintiff had elected to sue the defendant for negligence instead of making a claim against his own employer under the workmen's compensation statute. A verdict was found for the defendant and the plaintiff appealed. *Held*, that it was not reversible error for the defendant's counsel to urge that even if the plaintiff lost he could recover compensation from his employer, since the plaintiff had pleaded the compensation statute. *Youngs v. Cohen* (1917) 167 N. Y. Supp. 160.

Since the issue before the jury is concerned only with the merits of the case as between the plaintiff and defendant, the law is clear that evidence of the ultimate liability of someone other than a party to the suit is irrelevant and being highly prejudicial will furnish sufficient grounds for reversal. *Brown v. City of Scranton* (1911) 231 Pa. 593, 80 Atl. 1113; *Maraglino v. Comes* (1915) 90 Misc. 297, 153 N. Y. Supp. 579. Consequently, evidence is inadmissible that the plaintiff has a separate cause of action against an insurance company. *Fitzgibbons v. Schenectady Ry. Co.* (1914) 160 App. Div. 66, 145 N. Y. Supp. 401, or that the defendant is insured against liability, *Lone Star Brewing Co. v. Voith* (Tex. Civ. App. 1905) 84 S. W. 1100, and it has even been held that it was reversible error to allow the defendant to be asked whether he was not insured though he did not answer and though the jury was instructed to disregard the question. *Levinski v. Cooper* (Tex. Civ. App. 1912) 142 S. W. 959. However, where the evidence on the merits is strongly in the plaintiff's favor, a reasonable verdict for him will not be disturbed, *Tanner v. Harper* (1904) 32 Colo. 156, 75 Pac. 404, and where one of the parties brought out the fact of his own insurance on cross examination it was held that he could not complain that continual references by the other party to such fact influenced the verdict. *McTague v. Dowst* (1900) 51 App. Div. 206, 64 N. Y. Supp. 949. Since the allegations contained in the pleadings, though not put in evidence may be called to the attention of the jury, *Field v. Surpluss* (1903) 84 App. Div. 268, 82 N. Y. Supp. 127, the holding of the principal case seems correct.

TRUSTS—MINGLING OF TRUST FUND BY TRUSTEE EX MALEFICIO—PRESUMPTION.—The bank of which defendant was receiver had, by concealing its insolvency, induced the intervener to become a stockholder, and had mingled the money received in exchange for the stock with its other funds. At all times subsequent there was in the commingled mass more than the amount secured from the defendant, but the entire fund would have been exhausted by withdrawals but for deposits later than that of the money secured from the intervener. On a previous appeal, it had been held that the intervener was entitled to rescind the sale of the stock to him. See 13 Columbia Law Rev. 62. *Held*, since the bank was a trustee merely *ex maleficio*, it would not be presumed that it had intended to preserve the trust fund, and thus the identity of the latter was lost. *People v. California Safe Deposit & Trust Co.* (Cal. 1917) 167 Pac. 388.

When there are constant deposits in and withdrawals from a fund, it is generally presumed that the money is withdrawn in the order in which it is deposited. *Clayton's Case* (1816) 1 Meriv. 572; *Bank v. McNair* (1894) 114 N. C. 335, 19 S. E. 361. But when a person acting

in a fiduciary capacity deposits his own money and that belonging to the *cestui* in one account, and then draws against the combined fund, he will be considered as not intending any wrong, and it will be presumed that he draws out his own money first. *In re Hallett's Estate* (1879) 13 Ch. D. 696. But the *cestui* cannot obtain preference when the fund has been entirely expended by the fiduciary, *Slater v. The Oriental Mills* (1893) 18 R. I. 352, 27 Atl. 443, and if, at any time, the combined fund has contained less than the amount of the trust fund, he can obtain only the balance left at that time, *Board of Com'rs v. Strawn* (C. C. A. 1907) 157 Fed. 49, for there is no presumption that the fiduciary, having once withdrawn the trust money, intends to replace it. It would seem, however, that the exception should apply as well in the case of a trust imposed by operation of law as in the case of an express fiduciary relationship, *Importers and Traders' National Bank of New York v. Peters* (1890) 123 N. Y. 272, 25 N. E. 319; *In re Stewart* (D. C. 1907) 178 Fed. 463; *contra*, *First State Bank v. Oelke* (1910) 149 Iowa 662, 129 N. W. 70, and even though the defendant had only constructive notice of the trust, *Weiss v. Haight & Freese Co.* (C. C. 1907) 152 Fed. 479, for one who wrongfully mingles trust funds should be allowed to take out only what he can prove to be his. 2 Perry, *Trusts* (6th ed.) § 828; *Harrison v. Smith* (1884) 83 Mo. 210.

WATERS AND WATER COURSES—FROZEN PUBLIC WATERS AS HIGHWAYS—RIPARIAN RIGHTS.—Defendant company, a riparian owner, discharged heated water into the frozen river so that the ice melted. Plaintiff's son skated into the open water and was drowned. *Held*, it was at least a question for the jury whether the defendant, in the exercise of reasonable prudence, should have provided a guard, and further, to determine whether deceased was guilty of contributory negligence. *Parsons v. E. I. DuPont DeNemours Powder Co.* (Mich. 1917) 164 N. W. 413.

The public has the right to use the ice of public waters as a highway for travel or recreation, *French v. Camp* (1841) 18 Me. 433; see, *People's Ice Co. v. Davenport* (1889) 149 Mass. 322, 21 N. E. 385; Gould, *Waters* (3rd ed.) § 111, and people cutting ice on such waters are bound within reason to protect travelers from the holes thus made. *Woodman v. Pitman* (1887) 79 Me. 456, 10 Atl. 321; *Pennock v. Mitchell* (1908) 17 Ont. L. R. 286. A riparian owner is in no better position in this respect. As an owner he has the right to use the stream reasonably so as not to interfere with public or private uses. See, *Beidler v. Sanitary Dist. of Chicago* (1904) 211 Ill. 628, 71 N. E. 1118. When the stream is in a fluid state he is under a duty not to impair its navigability. *Gerrish v. Brown* (1863) 51 Me. 256. There is no reason why his liability should change when the river freezes. Discharging heated water into it so as to melt the ice is an unreasonable user as against the right to cut ice. *Sandusky etc. Co. v. Dixon etc. Co.* (C. C. A. 1915) 221 Fed. 200; see, *Walker Ice Co. v. American etc. Co.* (1904) 185 Mass. 463, 70 N. E. 937. It certainly is a precarious user as against the public right of travel and ought to subject the owner to the same reasonable obligation as is imposed on any person who cuts ice, *i. e.*, to guard the opening; especially since cutting ice is a public right while using the water is merely a private one. The holding in the principal case is well within the principles established by the above cases and it may be further supported by the analogous decisions holding that an abutting owner on a public road is under

a duty not to weaken its surface. *Milburn v. Fowler* (1882) 27 Hun 568; *Haverstraw v. Eckerson* (1908) 192 N. Y. 54, 84 N. E. 578; *Benfieldside etc. Board v. Consett etc. Co.* (1887) 3 Ex. D. 54. Of course the holding as to contributory negligence was proper since the duty to guard is not absolute. *Sickles v. N. J. Ice Co.* (1897) 153 N. Y. 83, 46 N. E. 1042.

WILLS—CONDITION CREATING FORFEITURE—WAIVER BY PARTY ENTITLED.—Testator put in a will after a gift of property, a condition that if any legatee contest the will, his share should go over to the other legatees. All the legatees waived a breach of this condition and all contested. *Held*, the waiver was ineffective and there was an intestacy of all the property bequeathed. *South Norwalk Trust Co. v. St. John* (Conn. 1917) 101 Atl. 961.

A condition not to contest a will has been held to be subsequent, *Bradford v. Bradford* (1869) 19 Oh. St. 546, or to create a gift on conditional limitation if there is a bequest over on breach of the condition. *Chew's Appeal* (1863) 45 Pa. 228; *cf. Fox v. Phelps* (N. Y. 1838) 20 Wend. 437. Although the courts do not favor the defeasance of vested estates, still, where the intention of the testator is clear, and there has been a real breach, such intention will govern. 2 Jarman, Wills (6th ed.) 1476. In the case of a pure condition subsequent, a breach thereof, will not create a forfeiture until re-entry by the heirs of the testator. 2 Reeves, Real Property, 1015. Therefore, the heirs of the testator, entitled after breach and re-entry, may waive the performance of the condition and clear the estate. *Andrews v. Senter* (1851) 32 Me. 394. It would follow, in a gift on conditional limitation, that any other person entitled to the estate after breach could waive performance. *Bowden v. Walker* (1874) 63 Tenn. 600; *cf. Drennen v. Heard* (D. C. 1912) 198 Fed. 414; see Fearn, Contingent Remainders (1st Am. ed.) 423. Moreover, it has been held that the party entitled to the benefit of the performance, as in a condition to support, may by words or conduct waive such condition and thereby avoid a forfeiture. *Rush v. Rush* (1872) 40 Ind. 83; *Alexander v. Alexander* (1900) 156 Mo. 413, 57 S. W. 110. But in those cases where there is an agreement between legatees to set aside a will, it will not be enforced unless it clearly appears that the testator's intention is not defeated thereby. *Walker v. Hollister* (1917) 20 Oh. N. P. (N. S.) 227. It would seem also that if the will had contained a clause expressly forbidding a waiver of the condition not to contest there would be a valid public policy in construing such clause as a restraint on the alienation of the gift over to the party first entitled. For if there had been such a restraint as a condition to the gift over, the court could have enforced it since it was a restraint on alienation to a particular person. Gray, Restraints on Alienation (2nd ed.) 32. Consequently, if such a condition can and ought to be implied, the decision in the principal case should follow.

WILLS—CONDITION NOT TO CONTEST.—A testator bequeathed certain legacies and stipulated that in case of the will being contested the share of the contesting legatee should be given to the other legatees. All the legatees joined in the contest. *Held*, in the absence of probable cause for the contest, the condition would be enforced. *South Norwalk Trust Co. v. St. John* (Conn. 1917) 101 Atl. 961.

The distinction between bequests and devises, as to the effect of

a condition not to contest, where there is a gift over on breach of the condition, does not appear to have been favorably received in this country. 12 Columbia Law Rev. 754. In any case of pure contest, *i. e.*, questioning the *animus testandi* of the testator, public policy would seem to require that the issue of testamentary capacity be freely litigated, if the contest is brought in good faith. For in such cases, the question is the actual ability of the testator to dispose of his property, and to allow conditions against contest to be valid under such circumstances would be to intrench fraud. *Rouse v. Branch* (1912) 91 S. C. 111, 74 S. E. 133. Therefore the rule indicated in the principal case, that if the contestant shows probable cause for the suit, a breach of the condition not to contest should not affect his right to receive the legacy, would seem to be correct. *Friend's Estate* (1904) 209 Pa. 442, 58 Atl. 853; Schouler, Wills (5th ed.) § 605. But the doctrine of *probalis causa litigandi* should not be applied to those cases where the testator disposes of property not his own, *Massie v. Massie* (1909) 54 Tex. Civ. App. 617, 118 S. W. 219, or about which there is a dispute. *Smithsonian Institution v. Meech* (1898) 169 U. S. 398, 18 Sup. Ct. 396. Here the testator clearly intends to claim the property as his own, and a condition not to contest should be enforced at all events. *Smithsonian Institution v. Meech*, *supra*. These cases can be treated as analogous to those involving the doctrine of election, *cf. Beall v. Schley* (Md. 1844) 2 Gill 181, and the legatee in order to take under the will should elect to stand by the will and all its conditions, or else claim under another right. It should be noted, however, that where a bill is filed for the construction of the clauses of a will, the courts will not regard this as a contest, *Black v. Herring* (1894) 79 Md. 146, 28 Atl. 1063, since it is either aiding the court in a proper determination of the testator's intentions, as to doubtful dispositions of property, or assisting the court in striking out illegal provisions in the will. See *Scott v. Ives* (1898) 22 Misc. 749, 51 N. Y. Supp. 49.

BOOK REVIEWS.

FRANCIS GOERTNER, *Editor-in-Charge.*

A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL, IN THE UNITED STATES. By FREDERICK N. JUDSON. 2nd edition. St. Louis: F. N. THOMAS LAW BOOK Co. 1917. pp. xxx, 1144.

The present pressing demand for new types of taxation to meet new needs makes this work most opportune. With the ever increasing number and variety of taxes, both state and federal, the average individual, whether lawyer, teacher or business man must find himself in need of a handy volume which will unravel the tangle for him. This Mr. Judson has done, though it must be noted that he deals entirely with the constitutional aspects of the question and makes no pretence at solving the underlying economic problems.

The author proceeds on a historical basis and through court decisions develops the law of the present day dealing with the powers, restrictions, relations, and inter-relations of the state and federal tax systems. In this respect the work is rather a collection of leading cases than an analytic or philosophic treatment of the subject, the author being content to present the law as it is without attempting any exposition of what it ought to be. Consequently, the result leans more towards an encyclopædia than a text book, without the completeness of the former type of work. This very characteristic of the book, however, is perhaps its most pleasing feature. For it lends itself to a comprehensive view of the extremely complicated question of taxation and provides an excellent general knowledge of the subject and a good starting point for the busy practitioner. As might be expected, the footnotes are not extensive, but the manner in which the court decisions are mingled with the text obviates any loss from want of footnotes and adds much to the very easy style of the author.

The appendix contains concise statements of the tax laws of the several states and furnishes not only a valuable panorama of these but also provides at a glance the main features in each individual state. The Federal Income Tax Law, with amendments included in brackets, and the War Revenue Act of 1917 will also be found in this portion of the book. These last features provide a valuable asset to the man who has only limited library facilities or who wishes to acquaint himself with the more vital aspects of taxation in a short space of time.

Clarence M. Tappen.

ROMAN LAW IN THE MODERN WORLD. By CHARLES P. SHERMAN. Boston: BOSTON BOOK Co. 1917. 3 vols., Vol. I, pp. xxvii, 413; Vol. II, pp. xxxii, 496; Vol. III, pp. vii, 315.

In a field which has attracted the great scholars of all nations a new treatise must contain some valuable and original features in order to justify its publication. The author of these volumes has in many ways satisfied this high standard and has produced a work which will be useful and authoritative. He is not so much concerned with the abstract principles of Roman law as he is with the history

of its descent into the modern world both as a whole and as regards specific rules of law. The development of Roman law and its reception by the nations of today occupy the first volume. The author has treated the latter subject country by country, a method which while simplifying the task of the writer, fails to give sufficient emphasis to the similarity of political, economic, and social conditions of the fourteenth and subsequent centuries which led to the revival of Roman law in Western Europe. Certainly the Bologna Revival gave the initial impetus to this movement; but if the conditions in other countries had not been favorable, if the earlier customary law had not been in a decadent condition, only a partial adoption of Roman law might have taken place, as was actually the case in England, where the customary law had at that time already developed into a national law. The author's treatment of the influence of the earlier systems of law on Roman law is interesting. So also is his account of the Roman law school, and his argument for the codification of American law.

The second volume is not so much a manual of Roman law as a comparison of specific rules of Roman law and the corresponding rules of Anglo-American, French, Spanish, German, and other modern legal systems. Without at all minimizing our debt to Rome, it would seem that a mere identity of principles would not inexorably prove a historical connection, but rather that since the object of law is justice, all systems tend to reach similar concrete rules of law. But all systems of law are rigid, though not in the same way, and it is in this sense of enabling the English courts to overcome the rigidity of the common law that Roman law has been of the greatest service.

The author has the unusual qualifications of having been at the same time an experienced teacher of this subject and a law librarian. Hence it is not surprising to find an entire volume devoted to a bibliography of Roman Law, with the materials for further study, both primary sources and modern references, arranged in sections corresponding to the sections of the History and the Manual. A comprehensive index completes a work which well deserves whatever favor may be accorded to it by the profession.

BOOKS RECEIVED.

CASES ON FUTURE INTERESTS. By ALBERT M. KALES. St. Paul: WEST PUBLISHING Co. 1917. pp. xxvi, 1456.

INTRODUCTION TO JURISTIC PSYCHOLOGY. By PRANODH CHANDRA BOSE. Calcutta: THACKER, SPINKS & Co. 1917. pp. 423.

APPELLATE JURISDICTION AND PROCEDURE. By ELIJAH N. ZOLINE. New York: CLARK BOARDMAN Co. 1917. pp. lx, 570.

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GOVERNMENT CONTROL OF CORPORATIONS.

Before entering upon a discussion of the subject of the control of corporations by government, we must first consider what corporations really are. Blackstone, in his enthusiasm for the common law, declared that all legal fictions are equitable. But the fiction of a separate independent artificial personality resulting from the association of a group of men for a particular purpose, has produced consequences which cannot always be commended. The human mind, particularly the legal mind, delights in subtleties and often resorts to circumlocutions to accomplish results which would seem to be equally attainable by direct methods. Yet the indirect and the mysterious continue to attract, and much of our modern law is built upon fictions as absurd as the dogma that the common law was the perfection of human wisdom.

The Romans conceived the idea of the State as an abstract entity superior to and exempt from the restraints of that moral law which governed its individual members. The German autocracy has built the modern German state upon the same theory, and the world today is rocking in mortal struggle between the conception of an abstract state above all law and that of a commonwealth of men and women subject in its aggregate capacity to the same immutable principles of right and wrong as those governing the human beings who compose it.

In a lesser degree, the history of corporations furnishes an example of the same tendency. The term corporation is a mere label for a great or small number of men associated together for a particular purpose, to the accomplishment of which continuity of organization is essential. For convenience in the realization of its objects, the fiction of separate legal personality was invented. This

fictitious personality, like the Roman and the German state, being the mere creation of human ingenuity, disclaimed all moral responsibility in the exercise of the powers conferred upon it. It was born of the intellect, not of the spirit, and even when erected for what were called *pious uses*, the consequences resulting from legal immortality and moral vacuity, very early in English history called forth the exercise of legislative restraint and control. In the Roman law, corporations were formed by mere association without sovereign consent. A corporation or *collegium* could be formed by not less than three persons, who were said to be *corporati-habere corpus*. They could hold property in common and have a common chest. They might sue or be sued by their agent. There was a complete separation in law between the rights of the *collegium* as a body and those of its individual members. The *collegium* remained in existence, although all its original members were changed, and it was governed by its own laws, provided they were not contrary to the public law.¹ They were little more than partnerships, with the incident of continued existence despite changes in membership, and they were at all times subject to the law of the land.

In England, the earliest corporations were the trade guilds, the municipalities and the religious institutions; but it seems always to have been the law that the King's consent, either impliedly or expressly given, was absolutely necessary to the erection of any corporation; this consent being given either by act of Parliament or by charter, although such consent might be presumed from the lapse of time—prescription. In the great case of *Sutton's Hospital*,² Lord Coke said:

"Lawful authority of incorporation; and that may be by four means, *sc.* by the common law, as the King himself, &c., by authority of parliament; by the King's charter (as in this case) and by prescription."

He also declared, in oft quoted language, that

"a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law; * * * They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney * * * A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear".

¹Encyclopædia Britannica, title "Corporations"; 1 Bl. Comm. (Sharswood's Ed.) 473.

²(1613) 10 Coke 23a, at pp. 29b, 32b.

This is the basis for the oft repeated assertion in the literature of the English and the American law that corporations have no souls. It emphasized the metaphysical conception of an artificial invisible body; a person, in the eyes of the law, created by the association of a number of human beings for a common enterprise.³ In that same case of *Sutton's Hospital*, another seed of much trouble in modern times was sown by the declaration that one corporation may be made a part of another. For instance, said Lord Coke:

"the Mayor, citizens and commonalty of London are created in their politic capacity Governors, &c. of the hospital of Bridewell * * * many corporations may be created one of another, as the Dean and chapter of Lincoln are a joint corporation, the Dean by himself is a corporation, and every of the Prebends is a corporation by himself".⁴

Here is the germ of the modern law authorizing one corporation to own stock in another, which has reached its fullest development in the holding corporation, created for the sole and express purpose of taking and exercising rights of ownership over stock in other corporations.

The American doctrine, like the English, is that no corporation can exist except by the will of the sovereign, exercised with us by the legislature. But in this country, as in England, a charter may be presumed to have been given to persons who have long acted as a corporation, and assumed and exercised all the powers of a corporate body, whether of an ordinary or extraordinary nature.⁵ Corporations created by royal charter, prior to the revolution, were by constitutional provisions in most states recognized and their powers declared inviolate by reason of the change in sovereignty. Thus, the first Constitution of the State of New York, adopted in 1777, contained a provision, which has been incorporated in every subsequent constitution, that

"nothing in this constitution contained shall be construed to affect any grants of land within this state, made by the authority of the said King or his predecessors, or to annul any charters to bodies politic, by him or them, or any of them, made prior to that day.

³"Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." 1 Bl. Comm. (Sharswood's Ed.) 123.

⁴At p. 32a.

⁵*Bank of United States v. Dandridge* (1827) 25 U. S. 64.

And that none of the said charters shall be adjudged to be void by reason of any non-user or mis-user of any of their respective rights or privileges, between the nineteenth day of April, in the year of our Lord one thousand seven hundred and seventy-five, and the publication of this constitution."⁶

The Constitution of 1846 provided for the creation of corporations under general laws, but declared that all general laws and special acts passed pursuant to such provision might be altered from time to time or repealed. The Constitution of 1894, Article VIII, repeated this provision.

The Constitution of the United States forbade states to enact laws impairing the obligations of a contract, and in the famous Dartmouth College case,⁷ a royal charter granted in 1769 erecting the corporation of Dartmouth College and granting to its trustees certain powers, was held to be a contract which was protected by this constitutional provision from modification or impairment by acts of the legislature of the State of New Hampshire. The line of distinction between contract rights which were protected and the powers of the legislature which must remain unimpaired was clearly drawn by Chief Justice Marshall.⁸

"If the act of incorporation", he said, "be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

"But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause."

⁶N. Y. Constitution of 1777, paragraph xxxvi.

⁷Dartmouth College v. Woodward (1819) 17 U. S. 520.

⁸At pp. 629-630.

Analyzing the history of the foundation and the nature of the institution, the Supreme Court held the case to fall within the second alternative above stated, and decided that the college had not become a public institution, its trustees were not public officers exercising powers conferred by the public upon public officers, and that neither from the fact of the incorporation nor the consideration of the persons for whose benefit the property given to the college was secured, could a conclusion be drawn at variance with the determination that the charter was a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire had succeeded) were the original parties. It is, said the Court,⁹

“a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.”

These facts, the Court held, did not remove the case from the operations of the Constitution, and the deliberate judgment of the Court was that the grant was a contract, the obligation of which could not be impaired without violating the Constitution of the United States.

“It may well be doubted,” said Mr. Justice Miller in commenting on this case, “whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this.”¹⁰

The decision, he said,

“has stood from the day it was made to the present hour as a great bulwark against popular effort through State legislation to evade the payment of just debts, the performance of obligatory contracts, and the general repudiation of the rights of creditors.”¹¹

⁹At p. 644.

¹⁰Miller, Constitution of the United States, 391.

¹¹At p. 394.

Yet, almost immediately after the decision of this case in 1819, states sought to prevent its application to future incorporations by inserting in all statutes granting corporate privileges and powers the condition that all charters should be subject to amendment, alteration or repeal at the pleasure of the legislature, and by inserting in state constitutions the provision that no charter of incorporation thereafter should be granted except subject to amendment, alteration or repeal at the will of the legislature. These provisions entered into and became a part of all charters of incorporation thereafter granted, and the contract of incorporation therefore was not violated or impaired by a subsequently enacted statute modifying or abolishing the powers granted.¹²

While the reservation of control in state constitutions or statutes puts charters conferring corporate capacity or grants upon the same footing as to amendment or repeal as other statutes so far as the relation of the state to the corporation is concerned, it is settled that the state may not by virtue of such reservation take away or destroy vested rights which have been acquired under a charter or grant, or which, by legitimate use of the powers granted, have become vested in the corporation.¹³

Therefore, it was held by the New York Court of Appeals that while the legislature might repeal the charter of the Broadway Surface Railroad Company, which had been organized under a general railroad law, because of the scandals attendant upon the methods by which it had procured from the Common Council of the City of New York power to lay its tracks and operate its railway in the city streets, thereby terminating the corporate existence of the company, such repeal did not affect the rights or franchises acquired by the company from the city, nor impair the force of the bonds it had issued and the mortgages executed by it upon its property and franchises to secure the payment thereof; and that all of these properties and intangible rights, upon the repeal of the charter, vested in the directors of the company as trustees for the creditors and stockholders, subject to all liens and contracts which lawfully had been created and entered into prior to such repeal.

"The power to repeal the charter of a corporation", said Chief Judge Ruger, in delivering the opinion of the court, "cannot, upon any legal principle,

¹²Miller, *op. cit.*, 557, 558.

¹³Marshall's Constitutional Opinions (Dillon's Ed.) 301, 302; *People v. O'Brien* (1888) 111 N. Y. 1, 18 N. E. 692.

include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred.

* * * * *

"It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens beyond the scope of express constitutional power."¹⁴

In the Dartmouth College case,¹⁵ Chief Justice Marshall defined a corporation as

"an artificial being, invisible, intangible, and existing only in contemplation of law."

Among the most important of its properties, he said,¹⁶

"are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

Ten years before the Dartmouth College case was decided, there came before the Supreme Court in the case of *Bank of United States v. Deveaux*,¹⁷ the question whether or not a corporation might sue in the federal courts under the provisions of the Constitution and the Judiciary Act which extended the judicial power of the United States to controversies between citizens of

¹⁴At pp. 48-49.

¹⁵*Supra*, footnote 7, at p. 636.

¹⁶At p. 636.

¹⁷(1809) 9 U. S. 61.

different states. Chief Justice Marshall, writing the opinion of the Court, held that

"That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, may not sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, not as a company of individuals, who in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union."¹⁸

Therefore, it was held that the Court might look to the character of the individuals who compose the corporation, and if all of them were citizens of a state other than that of the opposite party to the suit, maintain the jurisdiction of the federal court, but not otherwise. This decision is about the only recorded example of a narrow construction by Chief Justice Marshall of the powers granted by the Constitution to the federal government. The logic of the opinion is convincing, but its application would largely have destroyed the practical value of incorporation. Subsequent reflection led the great Chief Justice to a different conclusion, as his opinion in the Dartmouth College case demonstrates, and his biographers record that in later life he became satisfied that the decision in *Bank of United States v. Deveaux* was wrong. It was substantially overruled by the court in *Louisville R. R. v. Letson*,¹⁹ where it was held to be a legal presumption that the members of a corporation were citizens of the state in which alone the corporate body had legal existence; that a suit by or against the corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary was admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. This was reiterated in the cases of *Marshall v. Baltimore & Ohio R. R.*²⁰ and *Covington Drawbridge Co. v. Shepherd*,²¹ and was finally and definitely declared to be the law in an opinion by Chief Justice Taney in *Ohio & Mississippi R. R. v. Wheeler*.²² The Court in the con-

¹⁸At pp. 86-87.

¹⁹(1844) 43 U. S. 497.

²⁰(1853) 57 U. S. 314.

²¹(1857) 61 U. S. 227.

²²(1861) 66 U. S. 286.

sideration of this question was confronted with a dilemma: if they held that a corporation was a citizen of the state by which it was created, within the meaning of the Constitution, then it would follow that corporations were entitled to all of the rights secured to citizens in that document, and this would seriously restrict the legislative control of these bodies. Avoiding this conclusion, the Court was left free to determine, as it has, that a corporation is not a citizen within the meaning of Section 2 of Article IV, entitling the citizens of each state to all the privileges and immunities of citizens of the several states, nor the provisions of Section 1 of Article XIV, forbidding states to

“make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”.

On the other hand, it is well established that a corporation is a *person* within the meaning of the prohibitions of the Fifth Amendment against depriving a person of property without due process of law, or taking private property for public use without just compensation, and those of the Fourteenth Amendment which prohibit a state from depriving any person of life, liberty or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. As Judge Dillon says, the result finally reached by the Supreme Court respecting the capacity of a corporation to sue or be sued in the federal tribunals,

“was doubtless essential to carry out the full purpose of the Constitution in providing for a Federal judiciary, but the serious difficulties arising out of the word ‘citizen’ in the Constitution in reaching that result are among the most impressive illustrations of the important part which fiction plays in the development of every system of jurisprudence.”²³

Since the declaration of war with Germany, the question has arisen in our courts whether or not the fact that a majority of its shares are owned in Germany, precludes a corporation incorporated under the laws of one of the states from access to our courts during the war. In New York, the question was answered in the negative by the appellate term of the supreme court in the first department, in a learned and interesting opinion by Mr. Justice Lehman.²⁴

²³Marshall's Constitutional Opinions (Dillon's Ed.) 167.

²⁴Schultz Co. v. Raimes & Co. (1917) 100 Misc. 697, 166 N. Y. Supp. 567.

He cited and relied upon the statement in *St. Louis, etc., Ry. v. James*,²⁵ to the effect that the result of the decisions is that

"There is an indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it".

The conclusions of the court were thus summed up:²⁶

"Throughout all these decisions the courts have indicated practically unanimously that they regard a corporation as an entity separate and apart from its corporators; that its domicile is as a matter of law within the state of its creation and that the courts will not regard it merely as an association of individuals or regard the domicile or character of the corporators as affecting the domicile or character of the corporation. It may be that where a corporation is composed entirely of alien enemies residing in an enemy country a situation will arise requiring the interposition of a receiver or conservator to take charge of the corporate affairs because none of the members can legally deal with the corporation or actually manage its affairs; it may be that a corporation will be unable to distribute its profits for the same reason. So long, however, as a corporation created by any state still has legal existence and officers or agents with authority to do business or to bring actions, it cannot be deprived of access to the courts for the protection of its legal rights."

The personality or status of a corporation thus being settled, its mobility may be considered. Before the Supreme Court had settled the question of status, Chief Justice Taney declared in the great case of *Bank of Augusta v. Earle*²⁷ that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists, he said,²⁸

"only in contemplation of law, and by force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

²⁵ (1896) 161 U. S. 545, at p. 562, 16 Sup. Ct. 621.

²⁶ *Supra*, footnote 24, at p. 710.

²⁷ (1839) 38 U. S. 519.

²⁸ At p. 588.

Upon this *dictum* has been built a vast structure of law respecting the conditions which may be imposed by one state as a condition to the corporation of another state doing business within its limits; for, despite the assertion of the Court, corporations habitually do migrate and carry on business in states other than that of their creation. Indeed, this very case upheld the validity of a purchase in Alabama by the agents of certain corporations of other states of bills of exchange drawn there upon residents in New York. The Chief Justice in sustaining the validity of this transaction inquired what greater objection there could be to the capacity of an artificial person *by its agents*, to make a contract within the scope of its limited powers in a sovereignty in which it did not reside, than for a natural person, by its agents, to do a similar act, provided such contracts were permitted by the laws of the place. The right of migration was expressly recognized in *Canada Southern Ry. v. Gebhard*,²⁹ and in *Relfe v. Rundle*³⁰ it was stated that wherever a corporation goes it carries its charter, for that is the law of its existence, the same at home as abroad. A corporation of one country or state may be excluded from business in another country or state,³¹ but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country or state, be taken, both by the government and those who deal with it, as a creature of the law of its own country and subject to all the legislative control and direction that may properly be exercised over it at the place of its creation. It is on this basis, that in determining for the purposes of taxation, the value of the proportion of the capital of a corporation which is employed in business in a state, other than that of its creation, in which it is engaged in doing business, it is held to be lawful to include, not merely the tangible value of the property of the corporation within the taxing state, but that proportion of the intangible value which the value of the tangible property in one state bears to the aggregate of the tangible property in all the states.³²

Recognizing the right of migration, the later decisions of the Supreme Court have held that each state possesses plenary power to exclude a foreign corporation from doing business within its

²⁹ (1883) 109 U. S. 527, 3 Sup. Ct. 363.

³⁰ (1880) 103 U. S. 222.

³¹ *Paul v. Virginia* (1868) 75 U. S. 168.

³² See *Adams Express Co. v. Ohio* (1897) 165 U. S. 194, 17 Sup. Ct. 305; (1897) 166 U. S. 185, 17 Sup. Ct. 604.

borders, and, therefore, may impose upon its coming within them to carry on business any condition which is not in violation of the Constitution of the United States.³³ The limitation upon the power of the state is that it cannot make the right to do business within a state depend upon a surrender by the corporation of a privilege secured to it by the Constitution.³⁴ The Express Company cases,³⁵ the Drummers cases³⁶ and the Telegraph Company cases³⁷ are familiar instances of decisions by the Supreme Court holding state legislation to be unconstitutional as interfering with the federal regulation of interstate commerce. Subject, therefore, to restrictions imposed by the Federal Constitution and in many instances the state constitutions, protecting corporations as well as natural persons against deprivation of property without due process of law, the taking of property for public use without just compensation and the denial of the equal protection of the laws, the control of corporations by the state creating them is plenary. It is limited only by the prohibition against requiring the surrender of rights secured by the Constitution of the United States as a condition to carrying on business within the jurisdiction. Subject only to that limitation, every state has the absolute right to exclude or admit on such terms and conditions as it may choose to impose, a corporation created by another sovereignty. Even the protection against the taking of property without due process, the denial of equal protection and the liability to having private property taken for public use without compensation, is qualified by the increasing scope given by the Supreme Court in its recent decisions to the police power. That Court has declared it to have been established by its repeated decisions,

"that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by ex-

³³Paul v. Virginia, *supra*, footnote 31; Hammond Packing Co. v. Arkansas (1909) 212 U. S. 322, 29 Sup. Ct. 370; Security Mutual Life Ins. Co. v. Prewitt (1906) 200 U. S. 446, 26 Sup. Ct. 314; (1906) 202 U. S. 246, 26 Sup. Ct. 619.

³⁴Insurance Co. v. Morse (1874) 87 U. S. 445; Blake v. McClung (1898) 172 U. S. 239, 19 Sup. Ct. 165.

³⁵Crutcher v. Kentucky (1891) 141 U. S. 47, 11 Sup. Ct. 851.

³⁶Norfolk & Western Ry. v. Sims (1903) 191 U. S. 441, 24 Sup. Ct. 151; Rearick v. Pennsylvania (1906) 203 U. S. 507, 27 Sup. Ct. 159.

³⁷Pensacola Tel. Co. v. Western Union Tel. Co. (1877) 96 U. S. 1.

press grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals and safety."³⁸

This police power, the Supreme Court has characterized as

"one of the most essential powers of government, one that is the least limitable".³⁹

The Court has frequently declared the limits of the police power to be indefinable. The nearest approach to a definition given in the recent cases is that of Mr. Justice Holmes in the *Oklahoma Bank Guaranty* cases,⁴⁰ where he said:

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. * * * It will serve as a datum on this side, that in our opinion the statute before us is well within a State's constitutional power, while the use of public credit on a large scale to help individuals in business has been held to be beyond the line."

An example of a statute which was also held to be beyond the line is furnished in the case of *MacFarland v. American Sugar Co.*,⁴¹ where the Court said:

"If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws."

Dealing with more general conditions, in the case of *Adair v. United States*,⁴² the Court held that an act of Congress making it

³⁸*Chicago & Alton R. R. v. Tranbarger* (1915) 238 U. S. 67, at pp. 76-77, 35 Sup. Ct. 678.

³⁹*Hadacheck v. Los Angeles* (1915) 239 U. S. 394, at p. 410, 36 Sup. Ct. 143.

⁴⁰*Noble State Bank v. Haskell* (1911) 219 U. S. 104, at p. 112, 31 Sup. Ct. 186.

⁴¹(1916) 241 U. S. 79, at pp. 86-87, 36 Sup. Ct. 498.

⁴²(1908) 208 U. S. 161, 28 Sup. Ct. 277.

illegal for an employer engaged in interstate commerce to require as a condition to employment by it the making of an agreement that an employee would not become a member of a labor organization, was an invasion of personal liberty as well as of the right of property granted by the Fifth Amendment. And in *Coppage v. Kansas*,⁴³ it was held that a state statute making it a crime for an employer to require an employee to agree not to become or remain a member of a labor organization during the term of his employment was repugnant to the due process clause of the Fourteenth Amendment.

Police regulations, the Court has declared, in like manner as any other statute of a state, are subject to the equal protection clause of the Fourteenth Amendment. That guarantee, while not preventing proper classification, does entitle all persons and corporations within the jurisdiction of the state to the protection of equal laws, including police regulations, and therefore it was held that a state statute which imposed reciprocal burdens on both carrier and shipper, but which provided that in the case of delinquency on the part of the *carrier*, the shipper might recover an attorney fee, but made no provision that in case of delinquency on the part of the *shipper*, the carrier might recover a like fee, did not secure the equal protection of the law guaranteed by the Fourteenth Amendment, and therefore was void.⁴⁴

On the other hand, a statute of Arkansas requiring full switching crews on railroads exceeding one hundred miles in length was held not unconstitutional as depriving a railroad company over one hundred miles in length of its property without due process of law or as denying it equal protection of the law or as an interference with or burden upon interstate commerce.

"We have recognized", said the Court, "the impossibility of legislation being all comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."⁴⁵

As the Court said in considering a statute of Florida which made it a criminal offense to deliver for shipment in interstate

⁴³(1915) 236 U. S. 1, 35 Sup. Ct. 240.

⁴⁴*Atchison, T. & S. F. Ry. v. Vosburg* (1915) 238 U. S. 56, 35 Sup. Ct. 675.

⁴⁵*St. Louis & Iron Mt. Ry. v. Arkansas* (1916) 240 U. S. 518, at p. 521, 36 Sup. Ct. 443.

commerce citrous fruits then being immature and unfit for consumption:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. * * * The police power, in its broadest sense, includes all legislation and almost every function of civil government. * * * It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. * * * It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health."⁴⁶

Therefore, any attempt to deal with the subject of governmental control of corporations must always recognize that in the police power there is a vast reservoir of control, the extent of which may not be gauged in advance, but the precise application of which in any given case must be submitted to the consideration of the court, unless it clearly oversteps the limits of permissible legislative discretion and becomes the obvious exercise of arbitrary power.

The line of demarcation between the permitted and the prohibited exercise of the reserved police power of the state is not easily drawn. The doctrine as applied to railways—and it would seem to be equally applicable to all corporations carrying on a business affected with a public use—is thus summed up in a very recent decision of the Supreme Court.⁴⁷

"A State may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation.

* * * * *

"But while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guarantees of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it can-

⁴⁶*Sligh v. Kirkwood* (1915) 237 U. S. 52, at pp. 58-59, 35 Sup. Ct. 501.

⁴⁷*Mississippi R. R. Comm. v. Mobile & Ohio R. R.* (1917) 244 U. S. 388, at pp. 390, 391, 37 Sup. Ct. 602.

not be taken from its owners without just compensation or without due process of law.

* * * * *

"If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service it passes beyond legal bounds, and such action is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States."

Yet in view of the decision in the Trading Stamp cases,⁴⁸ the Net Weight Lard Statute,⁴⁹ and the "Blue Sy" Laws,⁵⁰ it may be assumed that only a clear exercise of arbitrary power such as that attempted to be exercised by the State of Louisiana in the statute condemned by the United States Supreme Court in *McFarland v. American Sugar Co.*⁵¹ will be held to overstep the state authority.

In one of the Trading Stamp cases, the Court said:⁵²

"It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of courts to arbitrate in such contrariety."

In the *McFarland* case, the Court said of a Louisiana statute which created a rebuttable presumption that any person systematically paying in that state a less price for sugar than he paid in any other state was a party to a monopoly or conspiracy in restraint of trade:⁵³

"As to presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential

⁴⁸*Rast v. Van Deman & Lewis* (1916) 240 U. S. 343, 36 Sup. Ct. 370.

⁴⁹*Armour & Co. v. North Dakota* (1916) 240 U. S. 510, 36 Sup. Ct. 370.

⁵⁰*Hall v. Geiger-Jones* (1917) 242 U. S. 539, 37 Sup. Ct. 217; *Caldwell v. Sioux Falls Stock Yards Co.* (1917) 242 U. S. 559, 37 Sup. Ct. 224; *Merrick v. Halsey & Co.* (1917) 242 U. S. 568, 37 Sup. Ct. 227.

⁵¹*Supra*, footnote 41.

⁵²*Supra*, footnote 48, at p. 357.

⁵³*Supra*, footnote 41, at p. 86.

that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R. v. Turnipseed*, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

An enumeration of an illustrative variety of classifications sustained as legal, being within the power of the legislature over the subject matter, is given by Mr. Justice McKenna in the opinion of the Court in one of the Trading Stamp cases,⁵⁴ where he contrasts the principle therein involved with the decision in *Truax v. Raich*,⁵⁵ which held a state statute void because it required all employers of five laborers or more to employ not less than eighty per cent. qualified electors or native-born citizens of the United States.

"The statute was held void", says the Court, "because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature."

One other feature of the question should be adverted to before closing this necessarily imperfect review of the subject, and that is the power of the federal government to regulate corporations created by the states through the exercise of the power to regulate commerce among the states.

In *Hale v. Henkel*,⁵⁶ the Court held that an officer or employee of a state corporation summoned before a federal grand jury as a witness was not excused from producing the books and documents of the corporation upon the ground that they might tend to incriminate it, declaring that while it was true that the corpora-

⁵⁴*Tanner v. Little* (1916) 240 U. S. 369, at pp. 382-383, 36 Sup. Ct. 379.

⁵⁵(1915) 239 U. S. 33, 36 Sup. Ct. 7.

⁵⁶(1906) 201 U. S. 43, 26 Sup. Ct. 370.

tion was chartered under the laws of one of the states and received its franchise from the legislature of that state, nevertheless

"such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty", the court continued, "the general government possesses the same right to see that its own laws are respected as the State would have had with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress."⁵⁷

So, in the exercise of this power and to carry out the prohibitions against combinations in restraint of trade or to effect monopoly, the federal courts have prohibited the continued stockholding by one corporation in another, under penalty of being deprived of the right to carry on commerce among the states,⁵⁸ and by the so-called Clayton Act of Congress, approved October 15th, 1914, supplementing the Sherman Anti-trust Law, it was enacted⁵⁹ that with certain exceptions and qualifications not necessary to consider here, no corporation engaged in interstate commerce shall acquire directly or indirectly the whole or any part of the stock or other share capital of another corporation also engaged in such commerce, where the effect of such acquisition might be substantially to lessen competition between the corporation whose stock was so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or to tend to create a monopoly of any line of commerce; that no corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce, where the effect of such acquisition or the use of such stock by the voting or granting of proxies or otherwise, may

⁵⁷At p. 75.

⁵⁸*Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632; *United States v. Union Pacific R. R.* (1912) 226 U. S. 61, at p. 97, 33 Sup. Ct. 53.

⁵⁹38 Stat. 731, § 7, 8 U. S. Comp. Stat. (1916) § 8835g.

be substantially to lessen competition between such corporations or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce; and that from and after a date fixed in the act, no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce (with certain exceptions), if such corporations are or shall have been theretofore by virtue of their business and local operation, competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws.

This statute has not yet been passed upon by the Supreme Court of the United States, and it is quite possible that some of its provisions may be held to be beyond the power of Congress to enact. Nevertheless, they are indicative of a growing tendency on the part of the federal government to regulate, not merely the activities, but the internal organization of corporations created under the laws of the states, and they must be regarded in connection with any consideration of the subject of governmental control.

The greatest advance in the judicial recognition of the extent of Congressional power over corporations engaged in interstate commerce was taken in the decision⁶⁰ upholding the constitutionality of the so-called Adamson Law, enacted by Congress in September, 1916, and approved by the President on Sunday, September 3, and also on Tuesday, September 5th, 1916,—probably the only statute ever approved by the President on Sunday; certainly the only one approved twice. This statute establishes an eight-hour day standard for work and wages as between the carriers and employees affected, and also fixes a scale of minimum wages for the eight-hour day, and proportionally for overtime, to be in force only during a limited period defined in the act.

Viewed as an act establishing an eight-hour day as the standard of service by employees, the Court held the statute to be clearly within the power of Congress under the commerce clause. So far as fixing wages is concerned, the Court held the act to be the exertion of the power of Congress to arbitrate compulsorily the dispute between the parties,—a power susceptible of exercise by direct legislation, as well as by enactment of other appropriate

⁶⁰*Wilson v. New* (1917) 243 U. S. 332, 37 Sup. Ct. 298.

means for reaching the same result. The existence of this latter power was predicated upon the nature of the business of a common carrier by rail—

“in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled”.⁶¹

The Court emphasized the distinction between the power to enact a law

“concerned only with those engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business”⁶²

which comes under the control of the right to regulate

“to the extent that the power to do so is appropriate or relevant to the business regulated”,⁶³

and the private right and private interest of employer and employees to agree as to a standard of wages, which, relating to a business not charged with a public interest, is not subject to be controlled or prevented by public authority.

A review of the decisions referred to will show the continued exercise by the legislature, with the approval of the courts, of the power to regulate the conduct of corporations, and the widening scope of the police power conceded by the federal government to the States. The power which is acquired by individuals working in co-operation is far greater than the aggregate force of the same number working separately. In union there is strength, is an ancient maxim. Throughout the history of civilization the struggle between the power of individuals and groups of individuals, on the one hand, and the interest of the commonwealth, on the other, has been continuous. No state can long endure, which does not preserve its supremacy over private combinations, whether in the garb of corporations, or otherwise. The ideal of the American republics has been the maintenance of liberty under law, for the security of the maximum scope of individual initiative consistent with the

⁶¹At p. 347.

⁶²At p. 353.

⁶³At pp. 353-354.

public welfare. To that end, constitutions, state and national, are ordained. The socialized state may be in an abstract sense a more ideal form of government than a representative republic exercising powers limited by fundamental law. But a society in which generous emulation was denied scope would speedily die, and our forefathers wisely framed our institutions in recognition of the facts of human nature. To the preservation of these opportunities and through them, the continued prosperity of the whole people, the constant and wise exercise of regulatory powers is required,—powers limited by prohibition against arbitrary act— but, except as thus limited, adaptable to all the changing exigencies of an increasingly complex civilization.

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THE SUPREME COURT'S AMBIGUOUS USE OF "VALUE" IN RATE CASES.

At the old common law the purveyors of many services and commodities were required to sell at "reasonable" prices. The reasonableness of the price seems to have been a question for the jury, and no precedents found their way into the law books. When the era of American state and national railroad regulation began, however, in the latter part of the nineteenth century, more systematic inquiries were made. The chief objects of regulation were to prevent improper discrimination between different shippers, and to prevent the charging of extortionate rates to the entire body of shippers. A particular rate might therefore be adjudged too high either because it imposed too great a *share* of the burden on one class of shippers relative to that borne by others, or because it imposed too great a total burden on all the shippers. If the burden was found to be properly distributed over all the classes, a rate was adjudged too high only in case the rates as a whole yielded too much revenue.

Thus the question of the amount of profits that is legitimate became a matter of official concern. There are cases, however, where the receipt of an excessive income may not be a good reason for lowering rates—where it may be considered preferable to divert the surplus to the public in some other manner, as by taxation or by a compulsory wage increase. The question of the amount of profits that is legitimate may therefore, in the future, underlie governmental questions more important than that of rate regulation. But as yet it has scarcely been raised in tax proceedings (except in our recent experiment with excess profits taxes) or in wage disputes. It has been raised frequently, however, in rate cases, and passed upon by commissions and courts. It has become a judicial commonplace that a company is entitled to charge rates sufficient to cover operating expenses, depreciation, and "a fair return" on the "value" (or on the "fair value", as it is sometimes phrased) of its property.

This formulation looks like a solution of the legal question of the legitimacy of the income, requiring only arithmetical ascertainment of certain stated facts. Instead of being a solution, however, the formula leaves the legal question precisely where it was before. The "value" to be "ascertained" is not the objective fact

which the name indicates—it is not the exchange value of the entire property. This will be pointed out more fully in a moment. The "value" on which a return is to be allowed may conceivably be some other objective fact, or it may be the amount to which the exchange value of the entire property *ought* to be made to conform. Therefore, any discussion of what is the best evidence of "value" (whether reproduction cost, for instance, is better evidence than original cost) is evidently futile without an accurate statement of what is meant by "value".

It should, perhaps, be noted that the Supreme Court has stated more than once that there may be exceptions to the requirement that rates must yield a "fair return". In *Covington &c. Turnpike Co. v. Sandford*,¹ Mr. Justice Harlan remarked that

"The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

Again in *Smyth v. Ames*,² he said:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Again, in *San Diego Land & Town Co. v. National City*,³ Mr. Justice Harlan referred to the actual cost basis as

"defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration."

Finally, in *Willcox v. Consolidated Gas Co.*,⁴ Mr. Justice Peckham, after declaring the general rule to be that the company is entitled to the benefit of any increase in land values, added:

"We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public."

¹(1896) 164 U. S. 578, at p. 596, 17 Sup. Ct. 198.

²(1898) 169 U. S. 466, at p. 547, 18 Sup. Ct. 418.

³(1899) 174 U. S. 739, at p. 757, 19 Sup. Ct. 804.

⁴(1909) 212 U. S. 19, at p. 52, 29 Sup. Ct. 192.

To say that the rate must not exceed what the service is reasonably worth, however, means nothing. If the court means what it is worth to each individual patron (what the economists term the "utility" of the service), that differs with each patron. If on the other hand it means the value in exchange (which is equivalent to what the economists term the "marginal utility"), that is by very definition what the company does charge. This is true unless a price is charged which calls forth a demand greater than the company can (or will) satisfy. In such a case the service is worth more than the price asked; the company could charge more without losing patronage. In this sense it would be possible for a rate to be less than the service is worth. It cannot possibly be greater, unless it is so high that nobody will purchase it at all.

In several cases, it may be remarked, the Wisconsin Railroad Commission has interpreted the phrase as justifying the fixing of a rate which will yield less than a fair return in cases where a higher rate would yield still less.⁵

The "value of the services" concept was not needed to justify the commission in the situation described, as it must be quite clear that the company is deprived of nothing at all when its rates are kept down to the point where they yield the utmost net earnings commercially possible. Indeed in another case the commission points out that "reasonable rates"

"cannot be exclusively measured by what the services are reasonably worth, for this reasonable value is so indefinite a quantity that it cannot always be determined. It may be represented by the cost of substitutes for the services in question; by the cost to the municipality, plus a fair addition for risks of furnishing the same; by what the customers can be made to pay; by the rates charged in other places; and by many other factors."⁶

The United States Supreme Court has not regulated rates itself, but it has frequently decided whether particular regulations made by legislatures or commissions prevent the earning of a sufficient return on a sufficient "value". A little consideration

⁵See, for instance, *In re Appl. Manitowoc Gas Co.* (1908) 3 Wis. R. C. R. 163, at p. 177; *State Journal Printing Co. v. Madison Gas & El. Co.* (1910) 4 Wis. R. C. R. 501, at p. 625; *In re Appl. Oconto City Water Supply Co.* (1911) 7 Wis. R. C. R. 497, at pp. 556-557. In the two cases first mentioned, the remarks of the commission were *dicta*, since a rate sufficient to yield a "fair return" was not out of the question.

⁶*Hill v. Antigo Water Co.* (1909) 3 Wis. R. C. R. 623, at p. 725.

will show, as has been pointed out by more than one writer,⁷ that the basis adopted by the Supreme Court has not been the market or exchange value of the entire property of the company. On that basis, no reductions in anticipated net earnings would be permissible. An investor who is considering purchase of the property or of a share of it will value the property by capitalizing the anticipated net earnings at a rate which varies with the risk. It is this rate (a rate sufficient to attract capital) that is generally meant by "a fair rate of return". If the market value is a capitalization of the anticipated earnings, the anticipated earnings must, by hypothesis, constitute a fair return on the market value so long as by "fair return" we mean the capitalization rate. If we mean by "fair return" some higher rate, the anticipated earnings under the existing rates will always be less than a "fair return" on the market value. If we mean by "fair return" a lower rate than that at which the earnings are capitalized in valuing the property, the earnings will always be found to constitute more than a "fair return" on the market value. After each reduction to a "fair return", the market value would shrink and the new earnings would amount to more than a "fair return" on the new value.

Suppose, for instance, that a business is anticipating earnings of \$100,000 a year. If the capitalization rate is 10% and the "fair return" but 8%, the business is *worth* \$1,000,000 and the anticipated earnings constitute 10% on what it is worth. If the earnings to be anticipated were reduced to the "fair return" of 8%, or \$80,000, the value of the business (capitalized at 10%) would fall to \$800,000. But even the reduced rates yield 10%, not 8%, on this new value, and a further reduction in the earnings to \$64,000 would be permissible, resulting in a further reduction in the value of the business and so on *ad infinitum*.

By defining "fair return", then, in some manner which would make it less than the capitalization rate, we should always find that the earnings anticipated under the present rates were more than a "fair return" on the market value of all the property. But the Court, as we shall see, has held in some cases that the earnings anticipated under the old rates did not constitute more than a "fair return" on the "fair value". If "fair return" be defined as less than the capitalization rate, it follows accordingly that the Court has not permitted earnings to be reduced to a "fair return" on the market value of the entire property.

⁷Cf., e. g., Commissioner Stevens's language, cited *infra*, p. 213.

Again, by defining "fair return" in a manner which would make it equal to or greater than the capitalization rate, we should never find that the anticipated net earnings under the existing rates exceeded a "fair return" on the market value of the entire property. But again the Court has held in some cases that the earnings anticipated under the old rates did exceed a "fair return" on the "fair value". If "fair return" be defined as equal to or greater than the capitalization rate, it follows that the Court has not insisted that earnings constitute a "fair return" on the market value of the entire property. But the Court has clearly stated that earnings may be reduced to a "fair return" (in some sense) on the "fair value" (in some sense), but may not be reduced further. It follows that, since in some cases the earnings must exceed a "fair return" (in one sense) on the market value of the entirety, and since in some cases they may fall short of a "fair return" (in the only other senses) on the market value of the entirety, the Court must have meant by "fair value" something other than the market value of the entirety.

That the Court did not mean to base the "fair return" on an amount which itself varies with the return, is not a matter of inference alone. The Court itself, in justifying the omission of "good will or advantage incident to the possession of a monopoly" from the valuation in *Cedar Rapids Gas Co. v. Cedar Rapids*,⁸ remarked that

"if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null."

The opinion was rendered by Mr. Justice Holmes. Again in the *Minnesota Rate Cases*,⁹ Mr. Justice Hughes refused to calculate the "fair value" of the roadbed by a process which in his view involved

"an appreciation [*sic*] of the returns from rates (when rates themselves are in dispute)".

In *Des Moines Gas Co. v. Des Moines*¹⁰ as well, Mr. Justice Day cited the *Cedar Rapids* Case in support of his disapproval of a rule whereunder

⁸(1912) 223 U. S. 655, at p. 669, 32 Sup. Ct. 389.

⁹(1913) 230 U. S. 352, at p. 455, 33 Sup. Ct. 729.

¹⁰(1915) 238 U. S. 153, at p. 171, 35 Sup. Ct. 811.

"income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public."

It seems evident, then, that the Court has not intended to safeguard a "fair return" on an amount which depends upon the earnings. Since the market value of the entire property is precisely that sort of amount, the Court cannot have intended to safeguard a "fair return" thereon unless it failed to realize that the market value does vary with the earnings. As expressed by Chairman Frank W. Stevens of the up-State New York Public Service Commission¹¹:

"There would seem to be no escape from the conclusion that when courts have used the term 'fair value' in rate cases, they had something in mind different from 'exchange value,' or in other words 'value'. It is not to be supposed that they did not comprehend that value depends upon the rate, and that a change in rate means a change in value if it affects net income."

It is, however, by inference, rather than by the Court's own express language, that it is to be supposed that it comprehended "that value depends upon the rate". Mr. Stevens, in his subsequent career as counsel to the New York Central Lines, apparently lost faith in the conclusiveness of this inference, and made a persuasive argument, based on the language of the decisions, to the effect that the Court meant nothing else than the exchange value of the entire property.¹²

The argument may be sound, but if so it indicates a misunderstanding by the Court of what affects the exchange value. On this supposition its decisions are too hopelessly confused to justify an attempt to draw any conclusions from them at all. It would be impossible to determine whether the Court's real purpose was to safeguard the market value of the entire property (which is inconsistent with permitting any reductions whatsoever in net earnings) or to permit reductions under certain circumstances (which is inconsistent with safeguarding the market value of the entire property). Its opinions would imply both purposes, and both cannot be carried out.

¹¹*Fuhrmann v. Cataract Power & Conduit Co.* (1913), 3 N. Y. P. S. Comm. (2nd Dist.) 656, at p. 681.

¹²See pamphlet entitled "The Valuation of Railroad Right of Way, No. 3" (1914).

While it is not impossible that the Court may have meant to allow a return on the exchange or market value of the entire property, and may accordingly have entertained a purpose inconsistent with its decrees sustaining reductions, it is not necessary to assume that such was its intent. It may have meant by "fair value" either the exchange value of a part only of the entire property, or else something different from exchange value altogether. In many of the cases before it, the opposing contentions concerned the relative merits of various "evidences" of the "fair value"—whether the Court should be guided, for instance, by the original cost rather than by the reproduction cost of the property. Let us see what light can be derived from the Court's action in regard to the various contentions put forward. Is the "fair value" identical with the actual cost, or with the actual cost so far as that was reasonably incurred, or with the cost of replacement new, or with the cost of replacement less depreciation, or with some amount on which all these figures would throw light? Has the Court considered any of these elements, or all of them, as evidence of some other fact? If so, what is that fact?

Taking first the actual decisions of the Supreme Court without regard to *dicta*, we find in the cases of *Reagan v. Farmers' Loan & Trust Co.*¹³ and *Covington & Turnpike Co. v. Sandford*¹⁴ that reductions which leave no net earnings at all are invalid. In *Smyth v. Ames*¹⁵ a reduction which did leave some net earnings was also annulled. The decision itself, however, throws no light on the question of the basis upon which the reduced rates must yield a fair return, since in that case the reduced earnings, as calculated by the court¹⁶, would yield less than a fair return on any basis contended for. The cases of *San Diego Land & Town Co. v. National City*¹⁷, *San Diego Land & Town Co. v. Jasper*¹⁸ and *Stanislaus County v. San Joaquin C. & I. Co.*¹⁹ decided that a

¹³ (1894) 154 U. S. 362, 14 Sup. Ct. 1047, *per* Brewer, J.

¹⁴ *Supra*, footnote 1, *per* Harlan, J. Cf. *supra*, p. 209, for the exception made by the Court to its general rule.

¹⁵ *Supra*, footnote 2, *per* Harlan, J.

¹⁶ The court's calculations (*cf.* p. 547) differed from those made by Mr. William Jennings Bryan, of counsel for the state, on the basis of which he contended (at p. 493) that the reduced rates would yield "a reasonable profit upon the present value of the roads." The decision does not, therefore, amount to a rejection of his conception of "present value * * * as measured by the cost of reproduction" (at p. 489).

¹⁷ *Supra*, footnote 3, *per* Harlan, J.

¹⁸ (1903) 189 U. S. 439, 23 Sup. Ct. 571, *per* Holmes, J.

¹⁹ (1904) 192 U. S. 201, 24 Sup. Ct. 241, *per* Peckham, J.

reduction was not necessarily invalid merely because the reduced rates would yield less than a fair return on an actual cost *which might be dishonest and extravagant*. As far as the actual decisions in these three cases are concerned, the Court did not have to choose in any of them between the basis of actual cost *so far as that is honest and reasonable* and any other basis. In *Knoxville v. Knoxville Water Co.*²⁰ it was decided that rates need not yield a "fair return" on reproduction cost unless that figure is corrected by deducting depreciation. In *Willcox v. Consolidated Gas Co.*²¹ and in the *Minnesota Rate Cases*,²² the "valuation" adopted in the opinions exceeded the actual cost. The reduced rates yielded a "fair return" on the amount adopted, and therefore more than a "fair return" on the actual cost. The rejection of actual cost in the opinions was therefore *obiter dictum*. The case of *Cedar Rapids Gas Co. v. Cedar Rapids*²⁴ decided nothing as to actual or reproduction cost. It decided only that the amount upon which the reduced earnings must yield a "fair return" need not include "the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price."

In *San Joaquin Co. v. Stanislaus County*,²⁵ the actual cost basis was distinctly rejected, and a reduction which yielded a "fair return" on actual cost but nothing on the water rights for which the company had paid nothing, was held invalid. The court, however, noted that the circumstances of the case were peculiar, in that only a few specified individuals would benefit from a reduction in the irrigation charges²⁶. It would accordingly be unsafe to regard the decision as a precedent in cases where an unlimited class would get the benefit. And in the subsequent case of *Des Moines Gas Co. v. Des Moines*²⁷ the Court rejected reproduction cost apparently in favor of actual cost. It sustained a reduction which would yield the company less than a "fair return" on what it would cost to cut through existing pavements to lay the mains, on the ground that the company had not in fact been obliged to

²⁰ (1909) 212 U. S. 1, 29 Sup. Ct. 148, *per* Moody, J.

²¹ *Supra*, footnote 4, *per* Peckham, J.

²² *Supra*, footnote 9, *per* Hughes, J.

²⁴ *Supra*, footnote 8, *per* Holmes, J.

²⁵ (1914) 233 U. S. 454, 34 Sup. Ct. 652, *per* Holmes, J.

²⁶ "Recurring to the fact that in every instance only a few specified individuals get the right to a supply". (at p. 460).

²⁷ *Supra*, footnote 10, at p. 172, *per* Day, J.

incur that expense, the mains having been laid before the street was paved.

The Supreme Court has never actually *decided*, then, that a reduction which would benefit more than a limited class was invalid when the reduced rates would still yield a "fair return" on the actual reasonable cost. On the other hand it has never held a reduction valid which would yield less than this amount. But it has held valid a reduction which would yield less than a "fair return" on the reproduction cost when undepreciated, and a reduction which would yield less than a "fair return" on the reproduction cost in a case where it was not apparent that depreciation would make any difference²⁸. The Court's actual decisions, as distinct from its *dicta*, are quite consistent with a power on the part of commissions to reduce earnings to a "fair return" on the actual reasonable cost. They do not require a return on the reproduction cost, new or depreciated.

The Court's *dicta*, however, as distinct from the decisions, require a return on an amount which may be greater or less than the actual reasonable cost. This "fair value", according to Mr. Justice Harlan in *Smyth v. Ames*²⁹, is something which is to be found by giving "such weight as may be just and right in each case" to various elements, including the original cost and the replacement cost. According to the same justice in *San Diego Land & Town Co. v. National City*³⁰, it is "the reasonable value of the property *at the time it is being used for the public.*" Mr. Justice Peckham tells us in *Willcox v. Consolidated Gas Co.*³¹ that "if the property * * * has increased in value since it was acquired, the company is entitled to the benefits of such increase." Finally in the *Minnesota Rate Cases*³² Mr. Justice Hughes says:

"It is clear that in ascertaining present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the com-

²⁸*Knoxville v. Knoxville Water Co.*, *supra*, footnote 20; *Des Moines Gas Co. v. Des Moines*, *supra*, footnote 10.

²⁹*Supra*, footnote 2, at p. 547.

³⁰*Supra*, footnote 3, at p. 757. The italics are mine. The case was cited with approval by Mr. Justice Holmes, in *San Diego Land & Town Co. v. Jasper*, *supra*, footnote 18, at p. 442, and by Mr. Justice Peckham, in *Stanislaus County v. San Joaquin C. & I. Co.*, *supra*, footnote 19, at p. 215.

³¹*Supra*, footnote 4, at p. 52. For a possible exception to the rule here laid down, see *supra*, p. 209.

³²*Supra*, footnote 9, at p. 454.

munity does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

These *dicta* make it clear that the Court does not intend in all cases to permit rates to be reduced to the point where they yield a "fair return" only on the actual reasonable cost. They must yield a return on an amount which may happen to exceed that cost at the time of the regulation. Yet this amount is not necessarily identical with what it would cost to replace the property at the time of the regulation, or with such replacement cost less depreciation. Mr. Justice Moody in *Knoxville v. Knoxville Water Co.*³³ referred to reproduction cost as "*one way of ascertaining the present value,*" and Mr. Justice Hughes in the *Minnesota Rate Cases*³⁴, referred to the cost of reproduction "method" as "*of service in ascertaining the present value*". And as we have seen, the Court sustained a reduction in the *Des Moines* case³⁵ which yielded less than a "fair return" on the cost of replacing at the time of the decision. What is, then, the "present value" or the "fair value", upon which the rates must yield a "fair return"? Let us recall that, unless the Court was hopelessly confused, the "fair value" is not the market value of the entire property.

The Court must have meant one of two things by "fair value". It may have meant the existing market value of the physical property plus perhaps a *reasonable amount* of the market value of the intangible elements (or plus, perhaps, the entire market value of the franchise as distinct from the other intangibles). It may on the other hand have meant by "fair value" the amount which it considered reasonable to permit the value of the entire business to attain. Neither alternative is entirely consistent with all of the Court's language.

There is a sense in which the exchange or market value of the physical property may be differentiated from that of the entire business. The exchange value is what someone *would* pay, if the

³³*Supra*, footnote 20, at p. 9. Italics are mine.

³⁴*Supra*, footnote 9, at p. 452. Italics are mine.

³⁵*Supra*, footnote 10, at p. 172. See, *supra*, p. 215.

property is not in the actual process of being exchanged. An outsider buying the physical property from the company to operate it with all the rights now possessed by the company, would pay as much as the market value of the entire business. He would not distinguish between the physical property and the "intangibles". The company, however, already in possession of the "intangibles", would not necessarily pay the owner of the physical parts of the property as much as this. It would pay no more than what it would have to pay for a substitute which, from the point of view of revenue production, would be equally efficient. It would not pay that much if the business as a whole had a market value which was less. Taking the market value of the physical property, then, to mean what the company would pay for that property to one who was not himself possessed of the operating rights, that value cannot exceed the market value of the whole, but it may fall short thereof. If it does fall short thereof, the difference between the "physical value" and the market value of the entirety would be the value of the "intangibles"—the franchise, "good will", "going value" and the like.

The Court may have intended to allow a "fair return" on the "physical value" as defined above. To allow a "fair return" (in the sense of the capitalization rate) on the "physical value" is to preserve that value from impairment. This could be done while at the same time permitting reductions in net earnings whenever they suffice to create an "intangible" value. As we shall see presently, however, the Court has not excluded all "intangibles" from the "fair value" on which the "fair return" must be based, and in the *Des Moines Gas* case, as we have seen already,³⁶ it allowed a reduction which left the company less than a "fair return" on what it would at the time cost to replace with an equally efficient substitute. It is not clear, however, that it intended in this case to allow a reduction to less than a "fair return" on the market value of the physical property, since it is not clear that the Court understood the relation between the existence of the paving and the market value of the gas mains. Mr. Justice Day seems to have thought that the paving did not in fact increase the market value of the mains. He said:³⁷

³⁶See, *supra*, p. 215.

³⁷*Supra*, footnote 10, at p. 172.

"The Master reached the conclusion that the life of the mains would not be enhanced by the necessity of removing the pavements, and that the Company had no right of property in the pavements thus dealt with, and that there was neither justice nor equity in requiring the people who had been at the expense of paving the streets to pay an additional sum for gas because the plant, when put in, would have to be at the expense of taking up and replacing the pavements in building the same. He held that such added value was wholly theoretical, when no benefit was derived therefrom. We find no error in this disposition of the question."

It is quite true that the value of the entire business is not necessarily enhanced by reason of the paving. The right to own the mains themselves, however, is more valuable when that ownership saves the company from incurring a large expense than it was when it saved the company from incurring a smaller expense only.

The point that the company did not own the pavement had also been made by Judge Miller of the New York Court of Appeals, in *People ex rel. Kings County Lighting Co. v. Willcox*.³⁸ In rejecting paving costs not incurred by the company, he said among other things:

"The case is not at all parallel to the so-called unearned increment of land. That the company owns. It does not own the pavements, and the laying of them does not add to its investment or increase the cost to it of producing gas."

No more, of course, does the increase in the value of land. But if we are after the value, not the cost, the right of ownership in the *pavement* makes no difference. The value of the right to own the main, not the pavement, is greater by reason of the obstacle which the paving (whoever owns it) offers to the acquisition of equally efficient mains in the same streets. Owning mains already laid is of more benefit to the owner than it would be if they could be more cheaply replaced—unless, of course, the earning-value of the mains were less even than the replacement cost in unpaved streets. The right to own a factory may be increased when competing foreign imports are excluded by a customs tariff. This fact would not be negatived by the fact that the owner of the factory does not himself own the customs houses.

³⁸(1914) 210 N. Y. 479, at p. 495, 104 N. E. 911.

The Court has not excluded all "intangibles" from the "fair value". In *Willcox v. Consolidated Gas Co.*³⁹ Mr. Justice Peckham remarked:

"It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. * * * The important question is always one of value."

If it were intended to include the value of all the "intangibles", the Court must either use the word "value" in some other sense than market value, or else it would get into the difficulties noted above in the discussion of the market value of the entire business. In dealing with the franchises, however, it is quite possible that the Court did not mean to include all of the intangible value. In this very case it excluded the "good will"⁴⁰, though possibly because none was thought to exist.⁴¹ In *Cedar Rapids Gas Co. v. Cedar Rapids*,⁴² Mr. Justice Holmes remarked:

"Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."

³⁹*Supra*, footnote 4, at p. 44.

⁴⁰At p. 52.

⁴¹The reasoning as to franchises is a little obscure. The Court allowed a value equal to the amount at which the franchises of the constituent companies had been capitalized at the time of the consolidation, but refused to allow the alleged subsequent increase in value for which the company contended. Though the reasoning on the two points is not wholly consistent, the language indicates a search for the exchange value of the franchise as well as of the physical property.

⁴²*Supra*, footnote 8, at pp. 669-670.

This might indicate an intention to safeguard the market value of the franchise alone (if that is distinguishable from the value of the intangibles as a whole), or else as an intention to safeguard so much of the value of all the intangibles as to the Court might seem fair.⁴³ Even if the latter was the Court's intention in dealing with "intangibles", it does not preclude the intention of safeguarding a "fair return" on the market value of the physical property plus the "fair amount" of the intangibles. But the former intention (to safeguard a fair return on the market value of the franchise while not protecting the other intangibles at all) is quite consistent with the decisions as to intangibles.

The existence of an intangible value is not to be accounted for exclusively by the possession of a franchise. If capital were perfectly free, not only legally but practically, to enter or leave the business in any quantity, large or small, there could be no intangible value. Sufficient capital would flow in to reduce the earnings until they sufficed only to attract the capital necessary for building a substitute—in other words until the market value of each concern as an entirety was equal only to the cost of building a substitute. The fact that capital is not free to enter may be due either to legal prohibition of its entry (as where the existing company has an exclusive franchise), or to other business circumstances. Among the latter may be mentioned "good will", "unfair practices" and the mere advantage of being first in a field where the demand for the services is sufficient to create an intangible element of value as long as the existing company is the only producer, without being sufficient to induce an outsider to enter that field and thereby cut down the value by adding to the supply. This last situation is due to the necessity of large-scale production, and would not be present where small-scale production is equally economical.

Only to the extent that the absence of competition, and the consequent presence of intangible value, is to be accounted for by legal prohibition, can that value be attributed to the franchise. The franchise consists of the right to exclude and the right to operate. The right to operate can have no value apart from the right to own the physical property. It is by virtue of the right to operate that the value of the physical property exceeds its junk value. That right accounts, then, for part of the value of the physical property (just as the right to make shoes accounts

⁴³For a further discussion of the implications of this language, see *infra*, footnote 54.

for part of the value of shoe machinery), but for none of the "intangible" value. As much of the latter as cannot be accounted for by the right to exclude, is therefore not franchise value at all, but the value of the other intangibles. In practice it would be difficult if not impossible to ascertain precisely how much of the intangible value is that of the franchise.

If the market value of the physical property (and of the franchise) is what is meant by "fair value", the constitutional theory of the Court would seem to be as follows: For the state to destroy part or all of the value of all intangibles except the franchise by reducing rates is either a deprivation of property, albeit *with* due process of law, or else no deprivation of property at all, the word "property" being used by the court in a sense to exclude all "intangibles" other than the franchise. For the state to destroy any part of the value of the tangible property (and perhaps of the franchise), on the other hand, by reducing rates, is not only a deprivation of property, but is *without* due process of law, no matter what grounds of public policy might be adduced for this destruction. If this is the theory on which the Court has been acting, its discretion in each case is limited to the ascertainment of a fact—how much the tangible property (and perhaps the franchise) is actually worth. If this is not the theory, the Court is not ascertaining a fact but is determining a question of policy—namely, to what level a state ought to be permitted to reduce the value of the entire property of a public service company.

If the Court is determining a policy, the constitutional theory would be, not that the destruction of any part of the value of the tangible property plus franchise is a deprivation of property without due process of law, but that the destruction of *more* of the value of the entire property than the Court thinks it "fair" to destroy would be a deprivation without due process. As long as the reduced rates yield a "fair return" on what the Court thinks fair, the deprivation of property would be *with* due process.

If the Court is using "fair value" in the sense of *the amount which it thinks fair*, then the Court in each case (except where controlled by its own precedents) is determining public policy rather than ascertaining a fact. But the language and reasoning of the decisions seem as a rule to imply a search for a fact, not a determination of public policy. They seem to imply, further, that the Court is endeavoring to protect some parts of the property from any impairment in value whatsoever.

Thus as early as January 4, 1886, Mr. Chief Justice Waite declared by way of *dictum* in *Stone v. Farmers' Loan & Trust Co.*⁴⁴ that "This power to regulate is not a power to destroy". In *Ames v. Union Pacific Ry.*⁴⁵ Mr. Justice Brewer, sitting as a circuit judge, referred to the rule safeguarding "a fair interest on the actual value of the property" as equivalent to the requirement of the payment of the "present value", "not the cost" in condemnation proceedings. On January 12, 1909, in *Willcox v. Consolidated Gas Co.*⁴⁶, Mr. Justice Peckham said:

"If the property, * * * has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public."

He cannot be using "value" in the sense of the amount which the court thinks just. The Court could hardly think that circumstances might arise in which it would be unjust to the public for the company to collect from it the amount which it would be just to collect.

Shortly before this (on January 4, 1909), Mr. Justice Moody spoke of "ascertaining" the value, in the Knoxville case⁴⁷. On June 9, 1913, Mr. Justice Hughes said in the *Minnesota Rate Cases*⁴⁸ that the "ascertainment" of the "fair" or "reasonable" value is not "a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

All the above expressions seem to indicate that the Court was seeking to ascertain the fact of what the value *is*, rather than to determine a policy of what it ought to be. This indication is not seriously weakened by the rejection in the Minnesota case of the company's use of "multipliers" as applied to the value of the lands adjacent to the railroads. The rejection was based partly on the entirely tenable ground that it would be impossible to show what

⁴⁴Railroad Commission Cases (1886) 116 U. S. 307, at p. 331, 6 Sup. Ct. 334.

⁴⁵(C. C. 1894), 64 Fed. 165, at 177.

⁴⁶*Supra*, footnote 4, at p. 52.

⁴⁷*Supra*, footnote 20, at p. 9.

⁴⁸*Supra*, footnote 9, at p. 434.

the roadbed would cost to reproduce, since the adjacent lands had a value largely dependent upon the existence of the railroad.^{48a} It was based also on the additional ground that⁴⁹

“The increase sought for ‘railway value’ * * * is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute)”.

It is likely that the court momentarily lost sight of the fact that, if judged by other business uses, the locomotives and rails would not have any value at all above that of old iron. The court seems to have feared that to allow a return on the value of the physical property for railroad uses would preclude the possibility of reducing the net earnings—forgetting that it might be quite possible to find earnings in excess of a fair return on the replacement cost, hence on the (railroad) market value of the physical property.

While most of the language of the Court indicates an attempt to ascertain the fact of value, we must not forget that in the Des Moines case⁵⁰, whether consciously or unconsciously, the Court permitted a reduction which would yield less than a fair return on the value of the physical property, and that here and there we find an expression which could be interpreted as an attempt to determine policy. Such, for example, is a statement in the Des Moines case⁵¹ (quoting with approval the report of the master) that

“there was neither justice nor equity in requiring the people who had been at the expense of paving the streets to pay an additional sum for gas because” *etc.*

The Court has never said unequivocally, then, whether “due process of law” precludes any reduction whatsoever of the exchange value of the physical property (and of the franchise proper), or whether it precludes such reduction in the value of the entire business as to the Court may seem too much.

Assuming for the moment that the Court has meant to safeguard the physical value (and perhaps the value of the franchise as distinct from the other intangibles) from impairment, it is

^{48a}At. p. 452.

⁴⁹At p. 455.

⁵⁰*Supra*, footnote 10.

⁵¹At p. 172.

worth noting at this point one or two facts in regard to the ascertainment of the physical value. The physical property, as already noted, cannot exceed in value what it would cost to build a substitute which, from the point of view of revenue production, would be equally efficient. An equally efficient substitute does not mean a superior one, and if the existing plant is partly worn out its value cannot be as great as the cost of replacing with a wholly new plant. With the latter the accumulation of the replacement fund could be postponed further into the future, and the annual contributions to that fund could be less than when the plant is partly worn out. The *net* earnings from the new plant would be greater, since a smaller annual amount is to be deducted from the *gross* earnings to care for depreciation. The cost of an equally efficient substitute cannot, therefore, exceed the cost of replacement new, minus accrued depreciation (unless, of course, a partly accumulated depreciation fund goes with the old plant).

While the exchange value of the physical property cannot exceed the cost of replacing it with an equally efficient substitute, it is not necessarily as great as this. It cannot exceed the capitalized anticipated earnings of the business.⁵² One would not pay more for the physical property of a utility company than that property was worth as a revenue producer, however much it might cost to replace it. This being the case, if the Court's only object is to prevent destruction of any part of the exchange value of the physical property (or of the "intangibles" too, for that matter), that object can as a rule be attained without granting an increase in the anticipated earnings. If the net earnings anticipated have always been less than a fair return on the replacement cost, the exchange value of the physical property is likewise less, and on that value the anticipated earnings already constitute a "fair return".

While it would therefore be beyond a state's power (on the constitutional assumption we are now making) to impair by rate reduction any "unearned increment" which may already have accrued, it would be within its power to prevent the accrual of any future "unearned increment" in the value of the property of public service companies. This it could do by forbidding the col-

⁵²Unless, indeed, it could be sold for more to another kind of business. Its value for the other business, however, could not possibly be impaired by reducing the earnings of the regulated business. If the Court means to prevent any destruction of the value, it is only necessary to allow a return (equal to the capitalization rate) on the value which the physical property possesses for the purpose of the regulated business.

lection of any net earnings beyond those already anticipated in the case of existing companies, and beyond a stated percentage of the capital invested in new companies, except upon securing the affirmative permission of the regulating commission.

If at the time of investment precise notice had been given the investors of the basis upon which a fair return was to be permitted, nothing more than a "fair return" upon that announced basis would be anticipated. The value would never exceed the amount of the basis, and the net earnings could be kept down by the state to the notified level without impairment of the value. The state might in such a case be constitutionally required, perhaps, to permit an increase in the *rates* when necessary for keeping the net earnings up to the old level (by reason of increased operating expenses). It might even be required, in case the current interest rate had advanced, to permit an increase in the net earnings to the point where they constitute the new and higher rate on the announced basis.⁵³ Except in such cases, however, a state could use its own discretion whether to permit any increase at all in net earnings, provided it had given the precise notice prior to investment. This is on the assumption that the court has intended to safeguard a "fair return" on the exchange value of the physical property (plus perhaps the franchise), with the object of protecting that value from impairment.

It is not entirely clear, however, that the court meant by "fair value" the exchange value of the physical property (plus the franchise). It may have been determining a question of policy after all. Should it declare unequivocally that this is what it has been doing, then its declarations (by way of *dictum*) that "fair value" may exceed the actual reasonable cost would be declarations of what in its opinion is sound public policy. Those declarations have all been made, however, in cases where the state was attempting to reduce rates, never where the state was refusing to permit an advance. In the cases before the Court, the proposed reductions would affect the interests of those who invested without precise knowledge of the basis which the state was intending to adopt. The Court has never stressed that fact, but it is possible that it might recognize a distinction between a state's reduction of earnings and a state's refusal to permit earnings

⁵³Unless the company had waived its right by the terms of the franchise which it had accepted. Even without this waiver, however, it is conceivable that the Court might draw a distinction between cutting the value down by reducing earnings and cutting it down by refusing to permit earnings to increase.

to increase. Or again, instead of drawing this line, it might distinguish between all those regulations which prevent earnings reaching the level which the investors have been permitted to anticipate, on the one hand, and those which from the very outset limit the amount which the investors may anticipate, on the other. In the former case the owner is likely to have paid more than he would have been willing to pay had he known what the state would do, and is in need of greater constitutional protection than had he invested with his eyes open.

Whether the Court would be inclined to make this distinction, however, is a matter for speculation. In any event, if the Court has been determining a question of policy rather than protecting the value of the physical property from impairment, we are in the dark as to what it has thought to be good policy in the cases before it. If the Court has not indeed been requiring a fair return on the exchange value of the physical property, neither has it on the replacement cost (new or depreciated), on the actual cost, or on the actual cost so far as it was reasonably incurred. Each of these bases has been rejected as the sole criterion, and if the criterion is something else on which all of these throw light, and if that something else is not the exchange value of the physical property (plus that of some of the intangibles), the Court has never revealed what it is or could be. It is true that the rejection of actual cost, where reasonable, has been only by way of *dictum*, but the *dicta* have been clear and emphatic. If the Court is declaring policy, what it rejects as the criterion of the best policy is clear enough. It seems to reject every definite conceivable basis. What it accepts is vague and indefinite.⁵⁴ It is only on the

⁵⁴In regard to franchises or donated property, Mr. Justice Holmes seems to have intimated that he thought it essential that the rates should suffice to give such property some market value. He seems to have been speaking of property in a franchise when, in *Cedar Rapids Gas Co. v. Cedar Rapids*, *supra*, footnote 8, at pp. 669-670, he said that "if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought," implying that this would not be a "fair interpretation of a bargain." Again in the *San Joaquin* case, *supra*, footnote 25, at pp. 460-461, he held that since the state court had held that water appropriated from a stream for irrigation was private property, "it is unreasonable to suppose" that the provisions of the state constitution as to water rates "meant to compel a gift from the former owner to the users and that in dealing with water 'appropriated for sale' it meant that there should be nothing to sell."

As a matter of fact there is no logical necessity for permitting the franchise or other donated property to have any exchange value at all. The purpose of granting the franchise (or other property) would not be nullified by refusing to permit it to acquire a value. The fact that the company may lawfully operate and the fact that it can actually collect even as

hypothesis that it is protecting the exchange value of some portion of the entire property from impairment that its declarations (except in the Des Moines case) are reasonably consistent, definite and clear.

In the present state of the law, we cannot be sure what the Supreme Court means to protect under the name of "fair value". Some future decision may clear up the matter. If the present confusion is not to continue, the Court will have to adopt one of the following positions, with the results indicated:

(1) It may hold that it has meant to protect the market value of the entire property, and that its decisions sustaining the validity of reductions were mistaken. This position would preclude all reductions in net earnings by way of rate regulation, but would not necessarily preclude legislatures or commissions from checking all increases in net earnings except such as appeal to the legislative or administrative, rather than the judicial sense of sound policy.⁵⁵

(2) The Court may hold that it has meant to protect the market value of the physical property only, or at most of the physical property and the franchise as distinct from the other intangibles. It will then have to reverse its decision as to pavement over mains in the Des Moines case. This position would not preclude all reductions in net earnings, and, as in the preceding case, would not preclude the checking of increases in net earnings.

(3) The Court may hold that it has meant to protect so much of the market value of the entire business as to it seems fair. In that case it would be necessary to state more clearly what amount it does think fair to protect. Not only would reductions, in this case, have to conform to the judicial sense of sound policy rather than to the administrative or legislative sense thereof; it is possible that action checking advances in earnings would have to meet the Court's approval. Whether the Court's rejection of

much as the permitted net earnings are what give its property a market value equal to the amount upon which the permitted net earnings constitute a "fair return." A "fair return" on the cost of replacing the physical property with equally efficient substitutes would result in no market value at all for the franchise. Even when the franchise has no market value, however, it is worth having. Without the right to operate, the rest of the property would have but a junk value. Without the exclusion of others the rest of the property might be reduced in value by cut-throat competition. The apparent paradox that a thing may be worth having even if it has no exchange value (even if it is not worth paying for because one can obtain it without paying—like air) has been familiar to economists since the days of Adam Smith.

⁵⁵With the qualifications mentioned, *supra*, p. 222.

actual reasonable cost in reduction cases indicates its disapproval thereof in advance cases, would remain to be decided; as would also the Court's positive conception of what it considers fair in reduction cases.

Pending the Court's clarification of its own meaning, there seems no reason why commissions should not discriminate between existing and future investments, and announce precisely to what extent and under what circumstances they will allow increases of returns in the former cases and any returns at all in the latter. Except for the returns already anticipated on the existing investments, the amount of returns permitted could be made to conform to the commissions' ideas of sound policy (subject to the possibility that the Court may ultimately decide otherwise). The question of policy has not been discussed in this article, but in cases where precise notice has been given to the investors there seems little reason for considering any question but the amount of return necessary to secure the needed capital and efficient management. That question is itself difficult enough, but its consideration would eliminate much of the labor now spent by commissions on "valuation" matters not relevant to it. It might also serve to develop a working conception of fair profits which could be applied in the broader field of taxation.

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THE PROTECTION AFFORDED AGAINST THE RETROACTIVE OPERATION OF AN OVERRULING DECISION.

In his able dissenting opinion in the case of *Hole v. Rittenhouse*,¹ Mr. Justice Black remarked:

"The judgment now about to be given, is one of 'death's doings'. No one can doubt that if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his property; and thousands of other men would have been saved from the imminent danger to which they are now exposed of losing the homes they have labored and paid for. But they are dead; and the law which should have protected those sacred rights has died with them. It is a melancholy reflection that the property of a citizen should be held by a tenure so frail. But 'new lords, new laws' is the order of the day. Hereafter if any man be offered a title which the Supreme Court has decided to be good, let him not buy if the Judges who made the decision are dead; if they are living let him get an insurance on their lives; for ye know not what a day or an hour may bring forth.

"The majority of this Court changes on the average once every nine years, without counting the chances of death and resignation. If each new set of Judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain, and vicious that the civilized world ever saw. A French constitution, or a South American republic, or a Mexican administration would be an immortal thing in comparison to the short-lived principles of Pennsylvania law. The rules of property which ought to be as steadfast as the hills, will become as unstable as the waves. To avoid this great calamity, I know of no resource but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority. But I would stand by their decisions, because they have passed into the law and become a part of it—have been relied on and acted on—and rights have grown up under them which it is unjust and cruel to take away."

¹(Pa. 1856) 2 Phila. 411, 417-418.

The spirit of the above quotation is evidenced in innumerable instances where courts adhere to the decisions of their predecessors, or to prior decisions of their own; and this even though they think those decisions erroneously made, where to overturn them would bring about confusion and disturb titles and rights which had been based upon and acquired under them. We often meet with the expression that

“it is of greater importance to society, that the rule should be uniform and stable, than that it should be the best possible rule that could be adopted.”

Particularly is this so where a decision by the court upon principles of law or the construction of a statute will form the basis of dealings with respect to property, of contractual obligations, or, if the decision deals with the penal law, of future acts and conduct. The unfortunate results which would follow a change in such decisions has led to a most strict adherence to and application of the doctrine expressed in the maxim *stare decisis, et non quieta movere*.²

Another consideration, perhaps of more importance than the protection of individuals from injury, has also influenced the courts. Frequent attacks on our courts and legal system are made on the ground that the law, unlike the other sciences, is not progressive; and the reason is ascribed to be chiefly the practice of the courts in following precedent. But equally frequent attacks are made on the ground that the law changes with the mood of the court, so that it is impossible for the public to act with safety. *Misera est servitus, ubi jus vagum aut incertum* is no idle maxim. Further, the consequences to the courts themselves and to our whole legal system are too serious to be treated lightly. In the words of a careful judge,

²For examples, see *Tribble v. Taul* (1828) 23 Ky. 304; *Scott v. Stewart* (1890) 84 Ga. 772, 11 S. E. 897; *Hill v. Railroad* (1906) 143 N. C. 539, 569-573, 55 S. E. 854; *County Commrs. Columbia Co. v. King* (1871) 13 Fla. 451; *Stallcup v. Tacoma* (1895) 13 Wash. 141, 151, 42 Pac. 541; *Grubbs v. State* (1865) 24 Ind. 295; *People v. Tompkins* (1906) 186 N. Y. 413, 79 N. E. 326; *Rex v. Younger* (1793) 5 Durnf. & East 449.

In the case last cited Lord Kenyon said: “Thirty-four years have nearly passed since the decision of *R. v. Cox*, which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years.” (At p. 450.)

"The people yield submission to the law, as expounded by the courts, because they have respect for their judgments and confidence in their integrity of purpose; but if by a shifting and vacillating course of decision the law becomes unsettled, and inevitable disaster and oppression follow the uncertainty thus created, they will forfeit that respect and confidence which Judges should so much desire and which is so important to the proper administration of the law and to the welfare of the State."³

Or, as expressed by another court,

"If in this court, a settled course of adjudication is overturned, * * * the credit and respect due to this court is shaken, by the phenomenon that A has lost his cause on the same ground that B gains his. * * * perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications."⁴

But the obligations imposed upon the courts by the doctrine of *stare decisis* is a moral obligation only. And while this moral obligation is, for the most part, recognized by the courts, they have full power, and indeed often do overrule the position taken by them in a previous case. The consequences of such action may be so disastrous to private rights and public welfare that we are led to inquire whether Judge Black was right when, after his "melancholy reflection that the property of a citizen should be held by a tenure so frail", he said that there was no other resource but that of *stare decisis*. It is the object of this paper to examine the sources and extent of protection afforded to interests and rights which have accrued under the law as declared by the highest court, against impairment by a subsequent change of decision by that court.

We are met at the outset with the ancient and well recognized theory that a court never makes law, but declares law: and that a judicial decision is but evidence of the law. An overruling decision, in this view, does not change law, therefore, but impeaches the overruled decision as evidence of the law. It follows that an overruling decision must operate retroactively; and an adherence to this view has been the main obstacle encountered by the courts in working out a doctrine which will give security against a change of

³Walker, J., in *Hill v. Railroad*, *supra*, footnote 2, at p. 589.

⁴Mills, J., in *Tribble v. Taul*, *supra*, footnote 2, at p. 305.

decisions. This theory, advanced by Blackstone,⁵ has been repudiated by several eminent writers.⁶ And though most of the courts express nominal allegiance to it, the hardship and mischief in its strict application has led many courts, as we shall see, to depart widely from it in so-called "exceptions", and to adhere the more rigidly to the doctrine of *stare decisis*.

It is proposed to consider first the results reached by the Supreme Court of the United States in the many attempts to claim protection under constitutional provisions; and then to consider the cases in the state courts.

PROTECTION AFFORDED BY THE SUPREME COURT OF THE UNITED STATES.

Article I, Sec. 10 of the United States Constitution provides that

"No State shall * * * pass any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts".

It is the protection afforded by this clause which seems to have been sought most often by parties who have suffered loss of property or contract rights because of the reversal of a former decision by a state court. Yet relief has been consistently denied on this ground. The Supreme Court of the United States has repeatedly held that this section is concerned only with laws passed by state legislative departments, and not with constructions of the law contained in judicial decisions. In the case of *Railroad Co. v. Rock*⁷ a bill was filed to have certain county bonds which the defendant held declared void, on the ground that they were irregularly issued. The state court decreed in accordance with the prayer. A writ of error was dismissed in the Supreme Court for lack of jurisdiction, the Court declaring that it was error to think that

"this court can, as an appellate tribunal, reverse the decision of a State court, because that court may hold a contract to be void which this court might hold to be valid."

The rule was clearly stated in *New Orleans Waterworks Co. v.*

⁵1 Bl. Comm. *68-71.

⁶Gray, *The Nature and Sources of the Law*; see dissenting opinion of Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.* (1909) 215 U. S. 349, 371, 30 Sup. Ct. 140.

⁷(1866) 71 U. S. 177, at p. 181.

Louisiana Sugar Refining Co.,⁸ where, in dismissing a writ of error to the state court, Mr. Justice Gray said:

"The prohibition [against impairing the obligation of contracts] is aimed at the legislative power of the State, and not at the decisions of its courts * * *.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed."

Numerous other cases have announced the same doctrine.⁹

Equally consistent in refusing to review the decision of a state court are the cases where it is alleged that a contract obligation, incurred in reliance upon a judicial decision, has been impaired by reason of a subsequent change by the court. The Constitution

"does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question * * *. * * * we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."¹⁰

It by no means follows, however, that relief is denied by the Supreme Court in every case. On the contrary, we find many cases in that tribunal in which rights have been regulated by the decision on which they were acquired, and not by the subsequent overruling decision. In an early case, *Ohio Life Ins. & Trust Co. v. Debolt*,¹¹ Chief Justice Taney asserted by way of *dictum* that

⁸(1888) 125 U. S. 18, at p. 30, 8 Sup. Ct. 741.

⁹*Knox v. Exchange Bank* (1870) 79 U. S. 379; *St. Paul, etc. Ry. v. Todd County*, (1892) 142 U. S. 282, 12 Sup. Ct. 281; *Central Land Co. v. Laidley* (1895) 159 U. S. 103, 16 Sup. Ct. 80; and cases cited in footnote 10, *infra*.

¹⁰*Cross Lake Club v. Louisiana* (1912) 224 U. S. 632, at pp. 638, 639, 32 Sup. Ct. 577; *National Mutual Bldg. & Loan Assn. v. Brahan* (1904) 193 U. S. 635, 24 Sup. Ct. 532; *Moore-Mansfield Co. v. Electrical Co.* (1914) 234 U. S. 619, 34 Sup. Ct. 941; *Willoughby v. City of Chicago* (1914) 235 U. S. 45, 35 Sup. Ct. 23; *Cleveland, etc. R. R. v. Cleveland* (1914) 235 U. S. 50, 35 Sup. Ct. 21.

¹¹(1853) 57 U. S. 416, at p. 432. The italics are ours.

"the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent acts of the legislature of the State, or decision of its courts, altering the construction of the law."

Some years later this *dictum* was followed in the case of *Gelpcke v. City of Dubuque*.¹² There the Iowa Supreme Court had upheld statutes authorizing the city to issue bonds. Later the same court, overruling its former decisions, held the statutes invalid. The plaintiff, a citizen of another state, brought suit on the bonds in the federal district court, and the defendant set up the unconstitutionality of the bond issue, as announced in the latest state court decision. The bonds in suit were issued after the decisions upholding the statutes, but before the overruling decision. On appeal, the Supreme Court refused to follow the latter decision, saying:

"However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past."¹³

Quoting the *dictum* of Chief Justice Taney in the *Debolt* case with approval, the Court continued:

"The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."¹⁴

Mr. Justice Miller, in a vigorous dissent, argued ably against "this invasion" of the right of the state courts to construe state statutes and constitutional provisions,

"in a case where there is no pretence that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States."¹⁵

As was said by Mr. Justice Holmes recently, the doctrine of the *Gelpcke* case was "a doctrine which it took this court a long time

¹²(1863) 68 U. S. 175.

¹³At p. 206.

¹⁴At p. 206.

¹⁵At p. 220.

to explain." The position taken by Mr. Justice Miller has met with the approbation of several writers on the question.¹⁶ But the doctrine of *Gelpcke v. City of Dubuque* has become firmly established, and the Supreme Court has followed it consistently.¹⁷

Wallace, the Supreme Court reporter at the time *Gelpcke v. City of Dubuque* was decided, speaks of the case in his preface to the volume as a case

"where high moral duties were enforced upon a whole community, seeking apparently to violate them".¹⁸

Judge Dillon, in his work on municipal corporations, while recognizing that the position of the Court in upholding the rights of the bondholders was novel, says:

"Upon the whole, however, there is little doubt that its course has had the approval of the profession in general, and the public".¹⁹

The exact basis of the doctrine is admittedly hard to ascertain. For a while it was thought that the decision rested upon the impairment of the contract clause of the Constitution, and, as we shall see, many of the state courts have proceeded upon this assumption. The later cases in the Supreme Court, however, show this to be error. It is to be noted that the *Gelpcke* case arose in the federal courts on a ground of jurisdiction independent of any constitutional question of protection of rights, namely, diversity of citizenship. The actual decision was, therefore, and has since been explained to be, that in a case originating in the federal courts, the last decision of the state court overruling former adjudications will not be followed by the federal court where to do so would impair contractual obligations which were valid by the decisions of the state court at the time they were incurred. That such is the limit of the doctrine is clearly shown, by subsequent cases.²⁰

¹⁶"The conclusion cannot be avoided that, taken by itself, as an abstract statement, the ruling of the *Trust Co. v. Debolt* and *Gelpcke v. City of Dubuque* has no place in the system of the law, as that term is known to the scientific lawyer." 9 American Law Rev. 381, 401; see also Kent, Comm. (12th ed.) *419, n. 1 (a), note by Holmes; 29 Central Law J. 465, 485.

¹⁷*Lee County v. Rogers* (1868) 74 U. S. 181; *Douglass v. County of Pike* (1879) 101 U. S. 677; *Los Angeles v. Los Angeles City Water Co.* (1900) 177 U. S. 558, 575, 20 Sup. Ct. 736.

¹⁸68 U. S., at p. xiii.

¹⁹Dillon, *Municipal Corporations* (5th ed.) § 897.

²⁰*Railroad Co. v. McClure* (1870) 77 U. S. 511; see also *Bacon v. Texas* (1896) 163 U. S. 207, 220-221, 16 Sup. Ct. 1023.

A more recent case must be noted in this connection. Following the holdings of the New York Court of Appeals in the Elevated Railroad cases, the lower New York court had allowed recovery for the damage to the plaintiff's easement of light and air by the elevation of the defendant's railroad from the surface of the street, in accordance with an Act of 1892. The court of appeals reversed the case, distinguishing it from the Elevated Railroad cases. On a writ of error to the court of appeals the Supreme Court of the United States in turn reversed its rulings, holding, in effect, that the Act of 1892 was an impairment of the obligation of contract.²¹ It refused to adopt the distinction made by the court of appeals, but treated that decision as overruling the Elevated Railroad cases. Mr. Justice McKenna, speaking for the majority of the Court said:

"When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

"And this is the ground of our decision. We are not called upon to discuss the power or limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States."²²

In other words, the Court here holds that in determining whether a statute impairs the obligation of contract, it will, for the purpose of determining whether the obligation exists, look to the decisions of the court of last resort in the state at the time the contract was made. This involves the holding that a change of decision which affects the obligation of contract, when such change involves the operation of a statute, is unconstitutional. It has been suggested²³ that the Act of 1892 was brought in for the purpose of assuming jurisdiction under the contract clause; that the decisions on which the contract was based were not made on the basis of any statutory enactment, and that these decisions had been altered by a decision, not by the statute. The suggestion seems well taken, and evidently the dissenting Judges took that view of the case. But it is also

²¹*Muhlker v. Harlem R. R.* (1905) 197 U. S. 544, 25 Sup. Ct. 522.

²²At p. 570.

²³4 *Illinois Law Rev.* 327, 331.

evident that the Court in fact based its decision on the effect of the statute, and did not intend to commit itself to the other doctrine.²⁴

In the Muhlker case, the plaintiff, in addition to the contract clause of the Constitution, relied also on the due process clause of the Fourteenth Amendment. And on this ground the decision is best explained.²⁵ It is well settled that the due process clause is not, as is the contract clause, directed against the legislature alone. It applies equally to the courts, and it is by no means unreasonable to argue that the destruction of obligations or other property rights, valid under the laws of the state when made, by an overruling judicial decision, is taking property without due process. It is admittedly difficult, however, to get any satisfactory support from the cases or from the expressions of the court for this view. The Muhlker case, as above pointed out, seems to rest on the contract clause. In *National Mutual Bldg. & Loan Ass'n. v. Brahan* ²⁶ the contention was made by counsel that the plaintiff's property was taken without due process of law, but a result adverse to the contention was reached. In *Falconer v. Simmons*,²⁷ Judge Brannon said:

"The courts having power to alter decisions, and such being the retroactive effect of change, the fourteenth amendment denying a state power to deprive one of property without due process of law, cannot affect this power of the courts, because it makes no change in powers of states existing before it came."

Further, in *Central Land Co. v. Laidley*,²⁸ where rights were affected by a change of decision, the Court said that

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law within, the Fourteenth Amendment".

From a review of the cases it thus appears that the protection afforded in the Supreme Court of the United States to property rights or contractual obligations acquired in reliance upon the law as announced by the state courts against impairment by a subse-

²⁴See also *Sauer v. City of New York* (1907) 206 U. S. 536, 27 Sup. Ct. 686.

²⁵4 Illinois Law Rev. 327; 22 Harvard Law Rev. 182.

²⁶*Supra*, footnote 10.

²⁷(1902) 51 W. Va. 172, at p. 177, 41 S. E. 193.

²⁸*Supra*, footnote 9, at p. 112.

quent change of decision, is limited. The doctrine of the Gelpcke case, the justice of which commends it to us all, is confined to those cases originating in the federal courts. The Court has as yet intimated no ground upon which a writ of error to the state court will be granted. The contention that the due process clause is applicable seems to be the best hope, but the Court has given little indication that such contention will be accepted.

PROTECTION AFFORDED BY THE STATE COURTS.

The state courts of last resort have, on independent grounds, gone far in protecting rights acquired in reliance upon a previous decision which they subsequently desire to overrule. An examination of the cases, however, afford little hope for establishing a satisfactory basis on which the decisions may be placed.

In the cases denying protection, reliance is placed primarily, of course, upon the orthodox doctrine mentioned above, that a judicial decision is not law, but only evidence of it; and consequently, when a decision is overruled, there is no ground upon which the rights can be saved. An excerpt from a fairly recent California case clearly expresses the position taken by these courts.

"It is claimed that at the time the contract was entered into, it was the established rule in this state that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee. It is true there had been decisions to that effect; but in the year following it was held that a deed absolute in form, intended as a mortgage, did convey the legal title. These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is".²⁹

A strict and logical adherence to this doctrine has led many courts to refuse to circumvent in any way the retroactive effect of an overruling decision.³⁰ The contention that the change of de-

²⁹Allen v. Allen (1892) 95 Cal. 184, at p. 199, 30 Pac. 213.

³⁰Falconer v. Simmons, *supra*, footnote 27; Crigler v. Shepler (1909) 79 Kan. 834, 101 Pac. 619; Hibbits v. Jack (1884) 97 Ind. 570; Storrie v. Cortes (1896) 90 Tex. 283, 38 S. W. 154; Stockton v. Dundee Mfg. Co. (1871) 22 N. J. Eq. 56; for expressions to the same effect see Herron v. Whitely, *etc.* Castings Co. (1910) 47 Ind. App. 335, 92 N. E. 555; Oliver Co. v. Louisville Realty Co. (1913) 156 Ky. 628, 161 S. W. 570; Swanson v. Ottumwa (1906) 131 Iowa 540, 106 N. W. 9. Several of these courts have reached a different result in other cases, where the equity of the situation was more evident. See footnote, *infra* 43.

cision is an impairment of contract within the constitutional provision is, as we have seen, rightly denied by these courts; little attention is given to the due process clause; the doctrine of *stare decisis* is invoked without result; and the injured party is dismissed, sometimes with regret.³¹

Two cases will illustrate the opposing results reached by the courts. The Supreme Court of the United States, construing the act of Congress making notes a legal tender, held it to be unconstitutional as to debts contracted before the passage of the act. In a subsequent case this decision was reversed. The New Jersey court, in *Stockton v. Dundee Mfg. Co.*,³² held that a tender of notes to a mortgagee before the later decision was good, although under the law as construed when the tender was made, the mortgage could only be paid in gold. The court said:

"A change by decision is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it.

"As the law now is, the defendant is entitled to pay this mortgage in what are known as legal tender notes, and as the decision relates back to the time when the tender was made in such notes, it must be considered for the purposes of this suit, that the mortgage debt was legally tendered before its commencement."³³

An opposite result was reached on the same facts by the New York courts.

"The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of the law. Respect for the decisions of courts is a duty inculcated by writers upon the law, and enforced by considerations of public policy."³⁴

A majority of the courts, following the doctrine of the New York case where they feel impelled to overrule their former position, have made provision for the rights which have accrued

³¹"If the appellant was in fact misled by the case of *Spurgeon v. Scheible*, *supra*, it is a misfortune to be most sincerely regretted, but, upon the facts stated in the pleadings, he is without remedy in this action." *Hibbits v. Jack*, *supra*, footnote 30, at p. 579.

³²*Supra*, footnote 30.

³³At p. 57.

³⁴*Harris v. Jex*. (1874) 55 N. Y. 421, at p. 424.

thereunder. In many cases, where a decision sustaining the constitutionality of a statute authorizing the issue of bonds is, subsequent to the issue, reversed, the validity of the bonds is determined by the law as it was judicially declared to be when the bonds were put upon the market.³⁵ Protection is also afforded in other cases involving a change of construction as to the validity of a statute.³⁶

In *Menges v. Dentler*,³⁷ the legislature had passed an act giving validity to a sheriff's deed which the court had declared invalid. The statute was held constitutional, and the defendant purchased the land. In an action of ejectment, the court overruled its previous decision, and held the statute unconstitutional; but the purchaser's title was protected.

"It is quite plain," said the court, "that the present title [the defendant's] depends upon faith in that department of government which alone may deal with such a subject, and upon the good faith of government in protecting those that trust in it. Men naturally trust in their government, and ought to do so, and they ought not to suffer for it."³⁸

Judgment, founded on the overruled decision, was given for the defendant.

Menges v. Dentler was followed a few years later in a case involving not the validity, but the construction of certain enabling acts.³⁹ The court had decided that, under the statutes, property settled to the separate use of a *feme covert*, hitherto inalienable, might be conveyed or incumbered. This decision was later overruled. In a suit on a mortgage, the plaintiff invoked the aid of a statute passed to protect the numerous persons who had invested their money in reliance on the first decision, declaring that the deeds and mortgages given in the interval between the two decisions should be valid. The court, believing the statute to be unconstitutional, held the plaintiff's mortgage valid under the doctrine of the *Menges* case, which was explained to be that

³⁵See *Harmon v. Auditor of Public Accounts* (1887) 123 Ill. 122, 13 N. E. 161; *Bond Debt Cases* (1879) 12 S. C. 200, 281; *State v. Mayor* (1902) 109 Tenn. 315, 322, 70 S. W. 1031.

³⁶*Willoughby v. Holderness* (1882) 62 N. H. 227; *Rutland R. R. v. Central Vermont R. R.* (1890) 63 Vt. 1, 21 Atl. 262, 731; *Thomas v. State ex rel. Gilbert* (1907) 76 Oh. St. 341, 81 N. E. 437.

³⁷(1858) 33 Pa. 495.

³⁸At p. 500.

³⁹*Geddes v. Brown* (Pa. 1863) 5 Phila. 180; see *Keyser's Appeal* (1889) 124 Pa. 80, 16 Atl. 577.

"a party who acts in accordance with the law as laid down by the highest tribunal in the State, while it is still law, shall not suffer because it is subsequently set aside and another and inconsistent rule substituted for it. This was, in effect, simply applying the doctrine to the Court, which the Court had announced with reference to the Legislature" (that the latter could not pass retroactive laws).⁴⁰

In the Menges case⁴¹ the purchaser's right is spoken of as a "superior equity", and it is said, "In strict law, the title remains; but in equity, it is lost". In the Geddes case we have the result that the court does what it says would be unconstitutional for the legislature to do. The judgment is in this peculiar form:⁴²

"Judgment is therefore rendered for the plaintiff on the special verdict, not because he has the law, but because he was entitled to believe that he had it when he took the mortgage on which he sues."

The same result has been reached by many courts.⁴³ In the first of the cases cited, decisions in force at the time a mortgage was given held that a conveyance from husband to wife under certain conditions created an equitable separate estate which might be mortgaged by the wife. Subsequently the court reversed itself, expressly and "intentionally" overruling former cases. Foreclosure of such a mortgage given before the first cases were overruled was decreed, however, on the ground that

"rights to property, and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the State, and which were valid contracts under the statute as thus interpreted, when the contract or investments were made, can not be annulled or divested by subsequent decisions of the same court overruling the former decisions.

"That as to such contracts or investments, it will be held that the decisions which were in force when

⁴⁰Geddes v. Brown, *supra*, footnote 39, at p. 187.

⁴¹*Supra*, footnote 37, at p. 499.

⁴²*Supra*, footnote 39, at p. 188.

⁴³Farrior v. New England Mortgage Security Co. (1890) 92 Ala. 176, 9 So. 532; Hood v. Pennsylvania Society (1908) 221 Pa. 474, 70 Atl. 845; Haskett v. Macey (1893) 134 Ind. 182, 33 N. E. 358; Ruf v. Mueller (1911) 49 Ind. App. 7, 96 N. E. 612; Stephenson v. Boody (1894) 139 Ind. 60, 38 N. E. 331; Levy v. Hitsche (1888) 40 La. Ann. 500, 508, 4 So. 472; see Mountain Grove Bank v. Douglas Co. (1898) 146 Mo. 42, 47 S. W. 944.

the contracts were made, had established a rule of property, upon which the parties had a right to rely, and that subsequent decisions can not retroact so as to impair rights acquired in good faith under a statute as construed by the former decisions."⁴⁴

Most all of the cases in the groups just considered cite the federal cases applying the doctrine of *Gelpcke v. City of Dubuque*⁴⁵ with approval, and generally as precedents. Some of them seem based on the misconstruction of these cases, that they were decided under the contract clause.⁴⁶ Certain expressions are found which point squarely to the view that a construction given by the courts to the law is the law itself.⁴⁷ Usually, though, the courts recognize as a general rule the doctrine that a decision is not law, but do not, as do the other courts, let its application interfere in the case before them. Some explain that

"the law of contract enters into the contract itself and, in the construction, forms a part of it. It is practically a dormant stipulation in the contract, and it must be enforced as a part of it and as it is construed at the time the contract is made."⁴⁸

But whatever reason the courts give, they do not, with but few exceptions, allow a change of construction of a statute or constitutional provision to retroact to the impairment of rights acquired in reliance on the first construction.

It has been said that the above result is

"an exception made by the courts, at the call of justice, to protect a contract made on the faith of a

⁴⁴*Farrior v. New England Mortgage Security Co.*, *supra*, footnote 43, at pp. 181-182.

⁴⁵*Supra*, footnote 12.

⁴⁶*Thomas v. State ex rel. Gilbert supra*, footnote 36; *Haskett v. Maxey, supra*, footnote 43; see *Harmon v. Auditor of Public Accounts, supra*, footnote 35.

⁴⁷"Its decisions then promulgated were the supreme law of the land, absolutely binding upon both parties to this cause. Hence all payment of taxes made under our law, which down to that time must be treated as valid for present purposes, were made in strict conformity to law." *Rutland R. R. v. Central Vermont R. R.*, *supra*, footnote 36, at p. 25. "The construction given to our laws by these decisions was the law itself at the date of that deed, and fixed the rights of the parties so that they could not be changed by a subsequent construction any more than by subsequent legislation." *Beatty, C. J.*, dissenting, in *Allen v. Allen, supra*, footnote 29, at p. 206; see also *Harris v. Jex, supra*, footnote 34.

⁴⁸*Hill v. Brown* (1907) 144 N. C. 117, at p. 119, 56 S. E. 693; see also *State v. O'Neil* (1910) 147 Iowa 513, 126 N. W. 454, *per Weaver, J.*

statute as expounded in the first decision"⁴⁹ and that "a mere decision expressive of general or common law will not protect even a contract valid under that common law tested by a prior decision against the effect of a subsequent change of decision."⁵⁰

But it is difficult to perceive why the "call of justice" is not as loud in a case of change of construction of the common law as in a case of change of construction of a statute. Certainly the injury occasioned may be as great. It is as reasonable to presume that the construction of the common law, announced in the decisions, was in the minds of the parties and entered and formed a part of the contract. It is just as important that the common law be definite and certain. Disrespect for the courts and court decrees is engendered as much by its change. And it is interesting to note that some courts have accepted this view. A recent Alabama case is a good illustration.⁵¹ An early decision had held that a court of equity could invest legal title by its decree. A later case overruled it. The question came before the court a third time and the old rule was re-established, the overruling decision being in turn overruled. But, said the court,⁵²

"That no injustice may be done to litigants who, under the influence of the decision made in the case of *Prewitt v. Ashford*, *supra*, have instituted proceedings to procure the legal title, we declare and hold that as to such cases the case of *Prewitt v. Ashford* operates as a rule of property."

Opportunity was afforded in a later case for the application of the decree,⁵³ and, quoting the saving clause made in the Jones case, the court held that *Prewitt v. Ashford* applied.

In *Hill v. Brown*⁵⁴ a defendant in partition proceedings, after final decree, acquired an outstanding interest from an owner who was not a party and attempted to set it up against the plaintiff,

⁴⁹*Falconer v. Simmons*, *supra*, footnote 27, at p. 178.

⁵⁰*Falconer v. Simmons*, *supra*, footnote 27, at p. 178; see also *State v. O'Neil*, *supra*, footnote 48, *per Deemer, C. J.* "There is a wide distinction between cases involving the validity and interpretation of statutes and those which have to deal with the common or unwritten law, for the reason that the judicial construction of a statute is a part of the law itself."

⁵¹*Jones v. Woodstock Iron Co.* (1891) 95 Ala. 551, 10 So. 635.

⁵²At p. 563.

⁵³*Ashford v. Prewitt* (1893) 102 Ala. 264, 272-273, 14 So. 663.

⁵⁴*Supra*, footnote 48.

who contended that he was estopped from doing so. The supreme court of the state had held in 1902 that a defendant so situated might set up an outstanding title procured by him after the final decree, and the defendant bought in his title in 1903. In 1904 the court had reversed its former ruling. It was held that the principles set forth in the first decision governed the case, and the defendant was protected.

It will thus be seen that the state courts have gone far to obviate the retroactive effect of a change in decision. It is not the purpose of this paper to justify under accepted traditions and theories, the result reached. But that the result is salutary can not well be doubted, both from the point of view of justice to the parties and of stability and strength of the courts. There are, indeed, many practical questions which will have to be worked out.⁵⁵ But there is a growing tendency among the courts to favor the result, and perhaps in time they will, independently of constitutional grounds, work out a satisfactory doctrine whereby the parties who have relied on early decisions will be protected from loss due to a change. The statement that the Supreme Court of the United States

"feels the touch of public opinion," which demands "along with police protection of the peace, civil protection of the vested rights asserted under private contract",⁵⁶

may equally be applied to the state courts.

THE PROTECTION AFFORDED IN CRIMINAL CASES.

The suggestion in the last paragraph is more forcefully illustrated in criminal cases, where an act which would not be a crime under decisions rendered at its commission, becomes a crime under a later decision. Naturally, the doctrine of *stare decisis* has great weight with the courts in criminal cases. In *People v. Tompkins*⁵⁷ the court was urged to overrule a previous decision that there could be no conviction for obtaining money by trick or fraud where the victim was induced to part with his money for an illegal purpose. The court, admitting that the rule was erroneous, said:⁵⁸

⁵⁵9 American Law Rev. 381.

⁵⁶Wilbur Larremore, *Stare Decisis and Contractual Rights*, 22 Harvard Law Rev. 182, at pp. 188, 189.

⁵⁷*Supra*, footnote 2; see also *Grubbs v. State*, *supra*, footnote 2; *Rex v. Younger*, *supra*, footnote 2. See excerpt quoted.

⁵⁸At p. 416.

"The law of this state, as set forth in the *McCord* case, has been in existence since 1837. It has become a rule of personal liberty * * * * * we are admonished that the remedy is not with the courts but in the legislature. We cannot change the existing rule without enacting, in effect, an *ex post facto* law.

* * * * *

"We can, therefore, do no more, and we feel constrained to do no less, than to supplement the recommendation [to alter the rule] made to the legislature".

But it has been declared that

"The doctrine of *stare decisis* in criminal cases cannot be carried to the extent of allowing to violators of law a vested interest in rules which have been erroneously sanctioned"⁵⁹

and it sometimes happens that a former decision is overruled to the prejudice of a defendant. In such a case the courts are eager to relieve from the retroactive effect of the later decision, and in the few cases on the subject, have almost unanimously protected the defendant.

Little basis is found for protection on constitutional grounds. The Supreme Court of the United States has held that such a change is not within the protection of the constitutional prohibition against *ex post facto* laws. In a recent case⁶⁰ the defendant's counsel contended that the decision of the state court that the defendant's failure to raise a certain objection upon the motion for a new trial amounted to a waiver of it, was inconsistent with the previous state practice, and therefore amounted in effect to an *ex post facto* law. The Court discussed the contention but briefly.

"The insistence * * * needs but a word. Assuming the inconsistency, it is sufficient to say that the constitutional prohibition * * * as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts."⁶¹

The only ground, therefore, upon which reliance may be placed for constitutional protection is on the due process clause of the Four-

⁵⁹*Lanier v. State* (1879) 57 Miss. 102, at p. 107.

⁶⁰*Frank v. Mangum* (1915) 237 U. S. 309, 35 Sup. Ct. 582.

⁶¹At p. 343; *Ross v. Oregon* (1913) 227 U. S. 150, 33 Sup. Ct. 220, *accord*.

teenth Amendment. And, as we saw in connection with property rights, the Court has as yet given little indication of affording protection on this ground.

The state courts, however, as in the case of property rights, seem to be working out a theory for themselves, independent of the Constitution.

A North Carolina statute made it a criminal offence for a tenant to remove crops without satisfying liens or giving notice. Previous decisions had held that the statute did not apply where the landlord owed the tenant more than the amount of the liens. In *State v. Bell*,⁶² the court felt impelled to overrule its former position. Although it was admitted that no precedent was to be found for their action, a new trial was granted the defendant, to be under the law as declared in the overruled decision.

"we are embarrassed", said the court, "in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this Court in *State v. Neal*, *supra*. If so, to try them by the law as herein announced would be an injustice. While it is true that no man has a vested right in a decision of the Court, it is equally

⁶²(1904) 136 N. C. 674, 49 S. E. 163. In a subsequent case in the same court, *State v. Fulton* (1908) 149 N. C. 485, 63 S. E. 145, a defendant was indicted for slandering his wife. A prior decision had held that a husband could not be convicted under the statute for such slander. Two judges maintained that view; two thought the former decision wrong and that the defendant should be convicted; one thought it erroneous also, but that the defendant should be protected under the doctrine of *State v. Bell*. He said: "While I think a husband is indictable for slandering his wife, this Court had decided otherwise, and he is entitled to the benefit of the law as it existed at the time of the alleged offense. Any other view would be productive of great wrong and injustice." (*Per Walker, J.*, at pp. 492-493). On the other hand Judge Connor who wrote the opinion in *State v. Bell*, referred to it as "one of those hard cases which are said to be the quicksands of the law. I do not think it should be extended or applied to the wanton and malicious slander with intent to destroy the reputation of an innocent woman." (At p. 507). And Chief Justice Clark remarked that "It would lead to insuperable embarrassments to hold that an inadvertent decision of a Court is a contract with the public." (At p. 500).

It will be noted that the act with which the defendant was charged was one which naturally excited little sympathy from the court. It has been suggested that a distinction should be made between acts *mala in se* and *mala prohibita*. "The act charged to be criminal may, in some cases, not be *per se* wrong or involve in any degree moral turpitude, and if not forbidden by the law, it may be morally and legally right to do the act. Therefore if, in doing such an act, the defendant has relied on a decision of this Court that it is not legally wrong, why should he be punished as a criminal?" Walker, J., in *State v. Fulton*, *supra*, at p. 493; see also *State v. O'Neil*, *supra*, footnote 48; 18 Yale Law Journal 422; but see 29 Harvard Law Rev. 80, 82, n. 13.

well settled that where, in the construction of a contract or in declaring the law respecting its validity, the Court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed. * * * In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this Court, to order a new trial, with the direction that the testimony offered in this case, in so far as it is made admissible by the ruling of this Court in *State v. Neal*, be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in Neal's case they are entitled to do so, but the construction now put upon the statute will be applied to all future cases."⁶³

In *State v. O'Neil*⁶⁴ the defendant was indicted for soliciting liquor orders in violation of a code provision which had been held unconstitutional in several cases, as interfering with interstate commerce. The Supreme Court of the United States subsequently upheld such a provision, and the Iowa Court had followed it, overruling its former decisions. The defendant's acts were committed before the reversal. The court was unanimous in reversing a conviction, but three opinions were rendered announcing different

⁶³At pp. 676-677. In this case, as well as in several others which we have noted, the court follows the overruled case, but announces that the new ruling will govern all similar cases in the future. This method of dealing with the question is a specific reform in our judicial system suggested by Hon. George F. Canfield, of the New York Bar, in the Annual Address delivered by him before the South Carolina Bar Association in August 1917. "As a specific reform, I have suggested that the court should expressly recognize it as a part of its duty to announce a new and better rule for regulating future transactions whenever it comes to a clear conviction that the rule established by the precedents has become clearly unsound in point of justice or policy. This may safely be done and ought to be done in every case where the court in effect condemns the rule which it applies to past transactions solely under the compulsion of the just principle of *stare decisis*. * * * Other instances might be cited in which the courts have not felt free to adopt a new and better rule, simply because justice seemed to require that the old rule should be applied to the existing controversy. Judges have been altogether too modest and humble. They have been altogether too unconscious of their power and responsibilities when, wrestling with an obstinate precedent or an obstinate statute, they have thrown up their hands in despair, saying that relief must be sought from the legislature. If they had had clearly in mind the distinction between the function of deciding the controversy before them and the function of announcing the rule of justice for the future, they would have perceived that it was well within their power to eliminate more promptly the influence of bad precedents."

⁶⁴*Supra*, footnote 48.

reasons for the result.⁶⁵ It is evident, however, that the injustice of convicting the defendant was the moving reason with all the court. As Judge McLain put it,

"To the ordinary mind it would smack of absurdity to say that the defendant ought to have known that the statute was constitutional, and would in case he violated it be enforced against him, although the Supreme Court of the state had fully considered the validity of the statute as against the claim that it was unconstitutional, and had unanimously held that it was in excess of state legislative power as to its entire subject-matter, and therefore invalid. Under such circumstances, it is plain that there should be some relief to defendant from punishment, for the very purpose of punishment is defeated, if unreasonably and arbitrarily imposed. Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law."⁶⁶

The same result was reached in a very recent case in Mississippi.⁶⁷ The defendant, a banker, was indicted under a code provision for receiving money for deposit while knowing the institution was insolvent. The statute had been judicially declared not to apply to certain acts, but subsequently the ruling of the court was reversed and such acts were held to be criminal. Between the two decisions the defendant committed such acts. After the cautious warning that

"We do not wish to be understood as announcing a general rule. We confine the rule herein announced strictly within the limits of this case. We are considering a change of decisions interpreting criminal statutes, and that alone."⁶⁸

⁶⁵McLain, *J.*, held that the defendant was not guilty for lack of criminal intent; Deemer, *C. J.*, held that to punish the defendant would be cruel and unusual punishment within the constitutional prohibition, and that the case came within the provision against *ex post facto* law; Weaver, *J.*, put the case on the ground that the acts of the defendant, though within the letter of the statute, were not within its purpose, reason or intent.

⁶⁶At p. 521. Compare the result reached in this case with that reached in *Crigler v. Shepler*, *supra*, footnote 30, where, on an exactly similar state of facts recovery of commissions was denied to a traveling salesman for the defendant liquor company on the ground that, although the services were legal under the state decision as they stood when rendered, the subsequent change in opinion had a retroactive operation and made his services illegal.

⁶⁷*State v. Longino* (1915) 109 Miss. 125, 67 So. 902.

⁶⁸At p. 131.

The court affirmed a judgment for the defendant on a demurrer to the indictment. Again several grounds are given by the court.

"We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect. This rule seems to be the just and the most reasonable rule. This rule applies the same principle as the constitutional prohibition of *ex post facto* legislation. It will prevent injustice and also prevent cruel and unusual punishment of individuals entirely innocent of any intention to violate the laws of the State."⁶⁹

But the dominant thought is to recognize "the common judgment of humanity as to what is right and just."

It must be noted again that in all of the above cases the defendant was protected against a change in the construction of a penal statute. The Mississippi court expressly limited its decision to such cases. Deemer, C. J., in *State v. O'Neil*,⁷⁰ also confined his opinion to cases where statutes were involved. No case has been found where there was a change of decision on a common-law principle. But, as was said with respect to property rights, the reasons moving the courts in the cases involving a change in construction of statutes apply with equal force to cases involving a change of accepted principles of the common law. And it is believed that, in a proper case, the courts will be as ready to protect against injury occasioned by a change of views.

SUMMARY.

Our review of the cases discloses that the doctrine of *stare decisis*, generally accepted as it is by our courts, forms a strong, if only moral, force to prevent the capricious change of decisions by a Court. Further, that where a change is made, protection is afforded in various ways against the retroactive operation of the overruling decision. We may tabulate the results as follows:

1. In cases originating in the federal courts, the last decision of a state court, overruling former decisions, will not be followed where to do so would interfere with rights acquired in reliance upon the first decisions.

2. The state courts, on one theory or another, almost universally protect property rights acquired in reliance upon a statute or constitutional provision as then interpreted by the courts.

⁶⁹At pp. 133-134.

⁷⁰*Supra*, footnote 48.

3. Men are not punished as criminals for acts which were done when the highest court of the state had declared them lawful.

4. The tendency is to extend the same protection to rights acquired in reliance upon decisions interpreting the common or unwritten law.

From the above results it is not too much to say that ultimately, where the courts feel impelled to abandon a position formerly taken, all rights will be protected against the retroactive effect of the overruling decision, and the people may rely upon the court decisions as announcing the law by which they are to be governed. True, it may like a statute, be repealed; but the repealing decision will, like the repealing statute, operate prospectively only.

The doctrine of *stare decisis* will not cover all cases. There will be cases where a change of ruling is desirable or necessary; and where legislative action to work the change will be impracticable. In such cases, the courts should be free and feel free to make the change. A doctrine which would permit the saving of rights based upon the first decision would make them the less reluctant to do so.

There are, of course, serious objections to be overcome. Constitutional difficulties have been suggested. A whole hearted repudiation of the theory that the courts only declare law—a theory which, as we have seen has already been abrogated and eaten into by exceptions—may be necessary. The suggestion that the courts have power to announce a new and better rule for regulating future transactions, while applying the old rule to the case in hand,⁷¹ may be accepted. Or, as suggested above, the courts may take the view that an overruling decision may operate so as to deprive a person of his liberty or property without due process of law. Certainly the tendency of the courts as reflected in the cases, some of which we have discussed, is to the view that the advantages of the result outweigh the objections to the basis.

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NEWNAN, GA.

⁷¹See *supra*, footnote 63.

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NOTES.

THE PRIVILEGE OF A LABOR UNION TO PERSUADE EMPLOYEES TO TERMINATE THEIR EMPLOYMENT IN ORDER TO JOIN THE UNION.—While the privilege of the individual to work or not to work was recognized, the common law abhorred a conspiracy, and a concerted refusal of several journeymen-tailors to work at so much *per diem* in order to secure

higher wages was held to be an indictable conspiracy.¹ This view is also sanctioned in several early American decisions.² The doctrine of these cases would obviously condemn any strike, but the unfairness of the rule was too patent to be long endured, and in due course the courts declared the workers' privilege to combine to better their conditions, and for proper purposes to quit work in concert in order to secure their ends.³ But in determining the scope of the privilege due regard should be had for the conflicting interests of others.

When A declines to continue in the employ of B, he is merely exercising the privilege of every individual to terminate an employment at will. But when A induces C to cease working for B, while C is exercising the same privilege with the same immunities as did A in the first case, there is the additional element that A is inducing the exercise of this privilege. True the consequences to B may be the same in both cases, but it may be desirable, in the interest of individual freedom, to permit A or C to exercise this privilege arbitrarily, and yet quite undesirable to permit A, without justification, to induce C to exercise the privilege. So it has been held that for A maliciously to entice customers or employees from B, solely because of his desire to injure B, and not to benefit himself, is actionable.⁴ But where A induces B's customers or employees to leave B in order to obtain their trade or services for himself, the courts have declared the resulting loss to B to fall within the principle of *damnum absque injuria*.⁵ The cases are distinguishable only upon the ground that in the latter group the benefit to A justifies the injury to B.⁶ However, A must not employ unfair means

¹The King v. Journeymen Taylors of Cambridge (1721) 8 Mod. *10. The following reasoning of the court is interesting: "yet it is not for the refusing to work, but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of The Tubwomen v. The Brewers of London. (a)". No citation follows "(a)" in the footnote of the tailors' case. The case of The Tubwomen which is notable because of the mystery which veils its identity is discussed in an article by William A. Purrington in 3 Columbia Law Rev. 447.

²People v. Fisher (N. Y. 1835) 14 Wend. 9. In this case it was held that a combination of journeymen-shoemakers to raise wages violated a penal statute forbidding a conspiracy: "6. To commit any act injurious * * * to trade or commerce." For other early American cases in accord see 3 Columbia Law Rev. 447.

³Commonwealth v. Hunt (1842) 45 Mass. 111; Sayre v. Louisville Union Benevolent Assn. (1863) 62 Ky. 143; Longshore Printing Co. v. Howell (1894) 26 Ore. 527, 38 Pac. 547; Gray v. Building Trades Council (1903) 91 Minn. 171, 97 N. W. 663; Wabash Ry. v. Hannahan (C. C. 1903) 121 Fed. 563.

⁴Tuttle v. Buck (1909) 107 Minn. 145, 119 N. W. 946; Webb v. Drake (1899) 52 La. Ann. 290, 26 So. 791; Thacker Coal Co. v. Burke (1906) 59 W. Va. 253, 53 S. E. 161.

⁵Nichol v. Martyn (1799) 2 Esp. 732; De Francesco v. Barnum (1890) 45 Ch. D. 430; Boston Glass Manufactory v. Binney (1827) 21 Mass. 425; De Jong v. Behrman Co. (1911) 148 App. Div. 37, 131 N. Y. Supp. 1083.

⁶"As to the vital distinction between Allen v. Flood [1898] A. C. 1, and the present case, it may be stated in a single sentence. In Allen v. Flood the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear

to induce C to exercise his privilege.⁷ Furthermore, it does not follow that an accruing benefit excuses, under all circumstances, a disturbance of relations between others. Thus, if A persuades C to violate a contract with B, A is not inducing the exercise of a privilege, but a breach of duty by C, and such conduct the law does not countenance.⁸ And it would also seem that there may be cases where the benefit to A is too remote, or too speculative, to justify the wilful disturbance of relations at will between B and C.⁹

It is believed that the rules applied in these cases form the basis of the modern law governing the warfare between organized labor and capital.

Since a strike involves the disturbance of relations between others,¹⁰ it would seem that it is lawful only when it is justified.¹¹ The difficult problem is one of justification, and this involves the weighing and balancing of the resulting benefit and injury to individuals and society,¹² which is not a legal problem except in so far as it is made so by the doctrine of *stare decisis*.

There is general agreement among the cases that a strike to secure an increase in wages, or obtain shorter hours, or otherwise directly better the position of the employees with reference to the employer, is justifiable.¹³ The benefit to the employees outweighs the injury to the

there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.'" *Per* Lord Shand in *Quinn v. Leatham* [1901] A. C. 495, 514.

⁷*Gunter v. Astor* (1819) 4 Moore 12. In this case the defendants clandestinely sent for the plaintiff's workmen, and having caused them to be intoxicated, induced them to sign an agreement to leave plaintiff and work for defendants.

⁸*Keane v. Boycott* (1795) 2 H. Bl. 511; *Lumley v. Gye* (1853) 2 El. & Bl. 216; *Wilkins and Brothers, Ltd. v. Weaver* [1915] 2 Ch. 322; *Walker v. Cronin* (1871) 107 Mass. 555; but see *De Jong v. Behrman Co.*, *supra*; *Rogers v. Evarts* (1891) 17 N. Y. Supp. 264. For a collection of cases on this point see 8 Columbia Law Rev. 496.

⁹*Tunstall v. Stearns Coal Co.* (C. C. A. 1911) 192 Fed. 808.

¹⁰It is submitted that when two or more employees agree to quit work in concert each employee is influencing the exercise of a privilege by each other employee, and is thereby disturbing relations between each other employee and their common employer. This is true whether the interference is direct or through the agency of duly authorized labor leaders.

¹¹*DeMinico v. Craig* (1911) 207 Mass. 593, 94 N. E. 317. But even if a strike is not justified and is, therefore, illegal, employees will not be enjoined from quitting work, although they may be liable to respond in damages if they do, for the reason that such constraint would place the employees in a condition of involuntary servitude. *Arthur v. Oakes* (C. C. A. 1894) 63 Fed. 310. Injunctions in such cases are confined to restraining officers of a union, or employees, from inducing others to quit work or withhold their patronage, or from otherwise interfering without justification with the relations between others. *Folsom v. Lewis* (1911) 208 Mass. 336, 94 N. E. 316; *Tunstall v. Stearns Coal Co.*, *supra*; *My Maryland Lodge v. Adt* (1905) 100 Md. 238, 59 Atl. 721; *Jonas Glass Co. v. Glass Bottle Blowers' Assn.* (1908) 77 N. J. Eq. 219, 79 Atl. 262.

¹²*Iron Molders' Union v. Allis-Chalmers Co.* (C. C. A. 1908) 166 Fed. 45. See suggestive note on this question in 31 Harvard Law Rev. 482.

¹³*Saulsberry v. Coopers' International Union* (1912) 147 Ky. 170, 143 S. W. 1018; *Karges Furniture Co. v. Amalgamated, etc., Union* (1905) 165 Ind. 421, 75 N. E. 877. See also cases cited in footnote 3.

employer, and the means of inflicting the injury is fair since the concerted action is the result of agreement and not coercion.¹⁴

The contested ground is reached when the strike operates to disturb existing or prospective relations between the employer and other persons not parties to the strike. Here the effect of the strike is to coerce rather than persuade the employer, or other persons, to exercise their privilege of ending or not establishing relations with each other. Some courts, while recognizing the privilege of disturbing by persuasion relations between others in furtherance of self-interest, deny the privilege of using coercion to accomplish this result. Thus, a strike to secure the closed shop,¹⁵ or to compel a boycott,¹⁶ has been declared unlawful. Other courts have taken the view that circumstances may justify the use of coercion so long as it does not assume the form of violence, and have sanctioned strikes to obtain the closed shop.¹⁷ Also, it has been held that a strike to eliminate the danger incurred by working with incompetent fellow employees is justifiable although it may compel the employer to discharge other workers.¹⁸ And it has been held that members of one union may strike in order to obtain for themselves other work then being done by members of another union.¹⁹ But a strike to compel the discharge of a foreman merely because he was disliked by the employees was declared unjustifiable.²⁰ Similarly, inducing an employer to discharge a non-union laborer merely because he would not join the union was condemned.²¹

It would seem that if coercion is to be permitted at all, much may be said in favor of the strike to compel a boycott where it appears that the purpose and effect is to substantially benefit laborers as a class, and there is authority for this view.²² However, most courts have regarded

¹⁴It has been held, however, that if members of a union are coerced by the imposition of fines to join in a strike, the interference is unlawful. *L. D. Willcutt & Sons Co. v. Driscoll* (1908) 200 Mass. 110, 85 N. E. 897. Also where an association by imposing fines coerced its members into withholding their patronage from another, the means of interference was declared unfair and therefore actionable. *Boutwell v. Marr* (1899) 71 Vt. 1, 42 Atl. 607.

¹⁵*Erdman v. Mitchell* (1903) 207 Pa. 79, 56 Atl. 327; *Lucke v. Clothing Cutters* (1893) 77 Md. 396, 26 Atl. 505. See 13 Columbia Law Rev. 66.

¹⁶*Burnham v. Dowd* (1914) 217 Mass. 351, 104 N. E. 841; *Jonas Glass Co. v. Glass Bottle Blowers' Assn.* (1908) 77 N. J. Eq. 219, 79 Atl. 262; *Purvis v. United Brotherhood* (1906) 214 Pa. 348, 63 Atl. 585; *Gray v. Building Trades Council*, *supra*. See 14 Columbia Law Rev. 694.

¹⁷*Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389; *Roddy v. United Mine Workers of America* (1914) 41 Okla. 621, 139 Pac. 126. See 13 Columbia Law Rev. 66.

¹⁸*National Protection Assn. v. Cumming* (1902) 170 N. Y. 315, 63 N. E. 369.

¹⁹*Pickett v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753.

²⁰*DeMinico v. Craig*, *supra*.

²¹*Curran v. Galen* (1897) 152 N. Y. 33, 46 N. E. 297; *Berry v. Donovan* (1905) 188 Mass. 353, 74 N. E. 603.

²²*Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581, 98 Pac. 1027. See also *Grant Const. Co. v. Bldg. Trades Council* (1917) 136 Minn. 167, 161 N. W. 520; *Cohn & Roth Electric Co. v. Bricklayers', etc., Local Union* (Conn. 1917) 101 Atl. 659. In a recent decision by the New York Court of Appeals a threatened strike to compel a boycott on unfair materials was declared lawful. *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582.

the benefit too remote to justify spreading the disturbance beyond the immediate parties who are at war, and strikes to compel boycotts have generally been held unlawful,²³ although the same result may be accomplished by argument and persuasion.²⁴

A recent case in the Supreme Court of the United States, *Hitchman Coal & Coke Co. v. Mitchell, et al.* (1917) 38 Sup. Ct. 65, presented a novel state of facts. The plaintiff was operating a coal mine under verbal agreements with its employees, who were servants at will, that only non-union laborers should be employed and that the employees should not continue in the employ of the plaintiff if they joined a labor union. The defendants, representing a labor union, were secretly persuading employees of the plaintiff to *agree* to join the union but to continue at work until a sufficient number had *agreed* to join the union to make possible a strike for the purpose of compelling the plaintiff to agree to employ only union labor. The majority of the court (three justices dissenting) taking the view that the defendants were inducing a breach of contract, held that an injunction should be granted. There is much to be said against this conclusion of fact,²⁵ but if it be admitted that for the employees to continue at work after *agreeing* to join the union was a breach of contract, the part of the decree which enjoined inducing a breach of contract was proper.²⁶ The decree, however, also restrained the defendants from persuading plaintiff's employees to terminate their employment and join the union which the employees were unquestionably privileged to do. Since the relations between the plaintiff and its employees were being disturbed by mere persuasion, the case is distinguishable from those cases condemning strikes to obtain the closed shop, or the discharge of disliked employees, or to compel a boycott, all of which are cases where relations are being disturbed by coercion. The case nearest in point is *Tunstall v. Stearns Coal Co.*²⁷ where representatives of a labor union were enjoined from paying money to employees in order to induce them to quit work where it appeared that the object of defendants was not to secure members for the union, but to inflict injury upon the plaintiff as a means of compelling an agreement with the union. Paying money as an inducement to others to exercise their privilege is not coercion and is lawful if the disturbance of the relations is otherwise justified.²⁸ It would seem, therefore, that the decision in *Tunstall v. Stearns Coal Co.* rests upon the ground that since the defendants' object was not to obtain an immediate benefit by increasing the union's membership, but primarily to inflict injury upon the plaintiff, the disturbance of relations was not justified. The decision in the principal case, however, seems to deny the privilege of the union to increase its membership and, therefore, increase its power for collective bargaining, by soliciting and persuading plaintiff's workmen to terminate their employment in order to

²³See cases cited in footnote 16.

²⁴*Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 164 N. Y. Supp. 533; *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 96 Pac. 127.

²⁵See note discussing this phase of the case in 16 Michigan Law Rev. 250.

²⁶See cases cited in footnote 8.

²⁷See footnote 9.

²⁸*Everett Waddey Co. v. R. T. Union* (1906) 105 Va. 188, 53 S. E. 273; *Rogers v. Evarts, supra*.

join the union. It is difficult to reconcile this conclusion with those decisions which permit striking employees to induce by peaceful persuasion others to quit work, or withhold their patronage from the employer.²⁹ In view of the tendency of courts generally to enlarge, rather than restrict, the scope of the workers' privilege to disturb relations in order to promote their own welfare, the decision was hardly to be expected.³⁰

INJUNCTION TO PROTECT THE RIGHT OF PROPERTY IN NEWS.—In a recent case, *Associated Press v. International News Service* (C. C. A. 1917) 245 Fed. 244, the complainant sought to restrain the defendant from appropriating news gathered at great cost by the complainant for the use of its members, and selling and transmitting the same to the customers of the defendant. The defendant, as the court below found, had thus appropriated the news by three methods: first, by employing and paying an employee of one of complainant's members to furnish such news as received from the complainant, before publication; second, by obtaining complainant's news before publication from the "New York American," published by one of complainant's members, and thus inducing such member to violate the confidence under which it receives the complainant's news; third, by taking complainant's news reports from the early editions of newspapers published by complainant's members, or from their bulletin boards, either transcribing them bodily or rewriting them without original investigation and without expense. The district court¹ had no hesitancy in enjoining the first two practices, and the soundness of its decree is supported by a long line of decisions both in this country and in England.² As to the third practice, although the court found the facts substantially as alleged, it entertained a sufficient doubt as to the propriety of the decree sought (considering that a new point was involved) that it refused the injunction. On appeal to the circuit court of appeals, a further decree was entered, enjoining the third practice.

²⁹*Jones v. Van Winkle Machine Works* (1908) 131 Ga. 336, 62 S. E. 236; *Karges Furniture Co. v. Amalgamated, etc., Union*, *supra*; *Iron Molders' Union v. Allis-Chalmers Co.*, *supra*; *Heitkamper v. Hoffmann*, *supra*; *Lindsay & Co. v. Montana Federation of Labor*, *supra*. But see *Jonas Glass Co. v. Glass Bottle Blowers' Assn.*, *supra*.

³⁰Suppose the employees of the plaintiff who had already agreed to join the union sought to persuade other employees to join. Would the court have restrained this interference?

¹*Associated Press v. International News Service* (D. C. 1917) 240 Fed. 983.

²(a) Injunction against inducing a breach of a contract. *Lumley v. Wagner* (1852) 1 De G., M. & G. *604, (employment contract); *Peabody v. Norfolk* (1868) 98 Mass. 452, (employment contract with provision not to disclose); *American Malting Co. v. Keitel* (C. C. A. 1913) 209 Fed. 351, (contract of sale); *Exchange Telegraph Co. v. Gregory & Co.* [1896] 1 Q. B. 147.

(b) Injunction against interference with confidential relationship. *Merchants' Syndicate Catalogue Co. v. Retailers etc. Co.* (D. C. 1913) 206 Fed. 545; *Tabor v. Hoffman* (1889) 118 N. Y. 30, 23 N. E. 12, (injunction against the use of patterns obtained through interference with confidential relationship); *Stone v. Grasselli Chemical Co.* (1903) 65 N. J. Eq. 756, 55 Atl. 736; *Pollard v. Photographic Co.* (1888) 40 Ch. D. 345.

As no breach of an express contract obligation or of a fiduciary relationship existed in the copying of news from a public bulletin and from newspapers sold on the street, the court based the equitable relief on the protection of a property right in the complainant. That the news gatherer has a property right in the news gathered has been thoroughly established.³ The right, however, is not of the same nature as the right of an author in his literary production or as the right of an inventor in his invention: the facts contained in the news, as facts, are the property of no one. The thing which creates the right in news, which gives it the nature of property, and the thing which equity protects, is the quality of "firstness", a quality which is acquired only after the vast expenditure of capital and labor required to collect the world's news in record time and to distribute it to the public. It is this quality of "firstness", brought about by the service of collection and distribution, which gives news its commercial value and which finds for it a place on the public market.⁴ The question on which the circuit court of appeals was called upon to pass was whether the acts of writing the news on a public bulletin or of printing the same in a newspaper and selling the paper on the street—acts which were absolutely necessary for service to the public and for a remuneration to the news gatherer—were such acts as surrendered and abandoned all the property right which the complainant had in the news, with the result that the defendant could with impunity copy the news and without any original investigation telegraph it broadcast throughout the country as its own and so reap the reward for which the complainant is expending \$3,500,000 annually. It seems obvious that under such a practice the Associated Press in the extensive scope of its present service could not long compete with the International News Service. It seems equally obvious that upon the withdrawal of the complainant from the business would come death to the business of the defendant as well. "The parasite that killed, would itself be killed, and the public would be left without any service at any price."⁵ Not only did

³National Tel. News Co. v. Western Union Tel. Co. (C. C. A. 1902) 119 Fed. 294; Board of Trade v. Christie Co. (1905) 198 U. S. 236, 25 Sup. Ct. 637; Dodge Co. v. Construction Information Co. (1903) 183 Mass. 62, 66 N. E. 204; Exchange Tel. Co. v. Gregory & Co., *supra*; Exchange Tel. Co. v. Central News, Ltd. [1897] 2 Ch. 48; Kiernan v. Manhattan Quotation Tel. Co. (N. Y. 1876) 50 How. Pr. 194.

⁴As to the nature of the property rights in news, see Exchange Tel. Co. v. Central News, Ltd., *supra*; Kiernan v. Manhattan Quotation Tel. Co., *supra*; Dodge Co. v. Construction Information Co., *supra*. In National Tel. Co. v. Western Union Tel. Co., *supra*, at p. 298, Judge Grosscup said: "Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour is passed. It is not desired by the patron for the intrinsic value of the happening recorded—the happening, as an happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality—to coin a word, the pre-communicatedness of the information—is the essence of the appellee's service; the quality that wins from the patron his patronage."

⁵National Tel. News Co. v. Western Union Tel. Co., *supra*, 296; see also Exchange Tel. Co. v. Gregory & Co., *supra*, 156; Kay, L. J. said: "It is obvious that what the defendant did could be done by others, and very few persons would become subscribers if the information could be got by inducing some person who had it as a subscriber to communicate to others in this way."

the circuit court of appeals in its decree satisfy the sense of justice and fair play inherent in the human kind by enjoining the defendant parasite from continuing its deadly work, but we submit that the decree is in full accord with the fundamental principles of equity jurisdiction and is not without controlling precedent.

We have said that the property right in news is of a different nature from the property right of an author in his literary production. The law has recognized this difference, and has made the literary production copyrightable whereby the law gives an absolute protection to the rights of the author through a period of years.⁶ If the author *publishes* his work without complying with the requirements of the copyright statute giving legal protection, he is held to have abandoned his property rights in the production and to have dedicated the same to the public.⁷ The same is true in relation to a patentable article when it is *published* without having complied with the patent law.⁸ But can the same be said to be true in any sense of a commodity around which the law has thrown no protective arm? News cannot be copyrighted;⁹ the literary form may be, but when we buy a newspaper on the street, we are not paying for literary form, we want what purports to be facts. Then as law grants no protection to news there is certainly no presumption of an intention to abandon the property right contained therein when the news is used in the only possible way it can be used to the gatherer's advantage or to that of the public. The term "publication" then, as used in its legal sense, in relation to copyrightable and patentable articles, has no similar application when used in relation to non-copy-rightable and non-patentable articles.¹⁰

⁶Copyright Statute, 35 Stat. 1075; 9 U. S. Comp. Stat. (1916) § 9517 *et seq.*

⁷This is the effect of the Copyright Statute, *supra*, § 9533. *New York Times v. The Sun etc. Ass'n.* (C. C. A. 1913) 204 Fed. 586; *Wheaton v. Peters* (1834) 33 U. S. 591; *The "Mark Twain" Case* (C. C. 1883) 14 Fed. 728.

⁸Under the statute 29 Stat. 692, 8 U. S. Comp. Stat. (1916) § 9430, abandonment will be presumed where there has been a public use more than two years before the application for the patent. *International Tooth Crown Co. v. Gaylord* (1891) 140 U. S. 55, 11 Sup. Ct. 716; *Egbert v. Lippmann* (1881) 104 U. S. 333; *Consolidated Fruit-Jar Co. v. Wright* (1876) 94 U. S. 92; *National Cash Register Co. v. American Cash Register Co.* (C. C. A. 1910) 178 Fed. 79; *Westcott Chuck Co. v. Oneida etc. Co.* (1910) 199 N. Y. 247 (patent had expired); see *Tabor v. Hoffman, supra*, 35.

⁹*Springfield v. Thame* (1903) 89 L. T. 242; see *Bowker*, Copyright 88, 89; *Walter v. Steinkopff* [1892] 3 Ch. 489, 495. In *National Tel. News Co. v. Western Union Tel. Co.*, *supra*, the court said, "Appellee could not in the nature of things, procure copyright under the Act of Congress upon its print tape." At p. 296. "In no accurate view can appellee be said to be a publisher or author." At p. 299. *Cf. Chilton v. Progress etc. Co.* [1895] 2 Ch. 29.

¹⁰In *National News Tel. Co. v. Western Union Tel. Co.*, *supra* at p. 300-301 the court expressly stated that publication as the term is applied to the Copyright Act as a limitation upon the right in authorship did not apply to the facts of that case. Judge Grosscup said: "Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law fashioned hitherto to fit relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of

Not only is there no presumption that the news gatherer intends to abandon his property right when he writes the news on the bulletin or sells a paper on the street, but, the very nature of the business, the expense and labor involved in collecting and distributing the news, raises a presumption that the gatherer intends to keep his property right as long as the news has commercial value.¹¹ Mr. A delivers a lecture or Mr. B produces a play; the public are admitted, but equity will enjoin any use of the lecture or the play which will affect the commercial value of the same in the hands of A or B.¹² There is no restriction on the number or the class of those who may look or listen; no contract is entered into, but equity plainly implies a restriction on the use to be made of the lecture or play.¹³ So in the news ticker cases the courts say there is a restriction, that there is a confidential relationship and that they will enjoin the breach,¹⁴ but the fact is that the news and stock quotations are posted on bulletins in offices, clubs, hotels, and the like where anyone who runs may read. Yet equity will enjoin any commercial use which tends to diminish or destroy the value of the news or quotations in the hands of the collector or his assignee.¹⁵ "The information will not become public property until the plaintiff has gained its reward."¹⁶ And so in the principal case,

servants? Are we to fail in our plain duty for mere lack of precedent? We choose, rather, to make precedent—one from which is eliminated, as immaterial, the law grown up around authorship—and we see no better way to start this precedent upon its career, than by affirming the order appealed from."

¹¹In *Aronson v. Baker* (1887) 43 N. J. Eq. 365, 12 Atl. 177, at p. 369, the court said: "The rule which I think should be adopted may be stated as follows: that the owner of a dramatic or musical composition may, like the owner of any other kind of property, do with his own as he pleases; he may retain it for his own use and benefit, or he may give it to the public out and out, or he may make a limited or partial dedication of it, and when his act of dedication is of such a character as to show unmistakably that he does not intend to abandon all right, but simply to give the public the right to have a limited use of his property, or to use it in a particular way, and to reserve to himself whatever is not plainly given, the public acquire the right to use his property to the extent of his dedication, but nothing more, and any use of it in excess of the extent dedicated is in violation of his reserved rights."

¹²*Ferris v. Frohman* (1912) 223 U. S. 424, 32 Sup. Ct. 263, (unpublished play); *Thompkins v. Hallack* (1882) 133 Mass. 32; *Aronson v. Baker, supra*; *Palmer v. DeWitt* (1872) 47 N. Y. 532; *Caird v. Sime* (1887) 12 App. Cas. 326; *Nicols v. Pitman* (1884) 26 Ch. D. 374; see *Drummond v. Altemus* (C. C. 1894) 60 Fed. 338.

¹³See cases cited in footnote 12.

¹⁴See *Board of Trade v. Christie Co., supra*; *Kiernan v. Manhattan Quotation Tel. Co., supra*.

¹⁵Cases in footnote 14, *supra*. *Board of Trade v. Tucker* (C. C. A. 1915) 221 Fed. 305; *Exchange Tel. Co. v. Central News, Ltd., supra*; *Exchange Tel. Co. v. Gregory & Co., supra*; *Board of Trade v. Hadden-Krull* (C. C. 1901) 109 Fed. 705.

¹⁶*Board of Trade v. Christie Co., supra*, p. 251. The nature of the protection sought in the principal case has a close analogy to that sought in *Fonotipia Ltd. v. Bradley* (C. C. 1909) 171 Fed. 951; and in *Prest-O-Lite Co. v. Davis* (D. C. 1913) 209 Fed. 917, aff'd (C. C. A. 1914) 215 Fed. 349.

In the former case at pp. 960-1, Judge Chatfield said, "We therefore reach the broad question of the power of a court of equity to secure to an individual by injunction the full employment of both corporeal and incor-

although the news is sold to the public in the shape of newspapers or donated to the public by writing on bulletin boards—a condition where an express restriction would not only be ineffective but absurd—the equity court is not reaching too far when it implies and enforces a restriction that the news shall not be used in such a way as to defeat the commercial value which it has to the complainant or to deprive him of the reward because of which alone the business and public service of news gathering is made profitable. In fact we fail to find a single case where an equity court in dealing with a commercial commodity—a result or record of expense and labor—has held that a use which was necessary to make the commercial value of the commodity available was at the same time such an act or “publication” as destroyed the property right, the value of which was just beginning to be realized.¹⁷ If such is the result of the decisions, the court in enjoining the third practice set forth in the bill applies to a new set of facts, and in the most just and beneficial manner, a rule which is supported by an abundance of authority.

LIABILITY OF A CHARITABLE INSTITUTION FOR TORTS.—The general rule that an employer is liable not only for his own wrongful acts, but also for those of his servants committed in the course of their employment, is subject to an exception in favor of charitable institutions.¹

corporeal rights in property created by him or at his expense, and capable of a taking by another, where such taking either diminishes or destroys the enjoyment of those rights by the owner and divests a part of the enjoyment of profits from the rights to the one complained of.”

¹⁷*Exchange Tel. Co. v. Central News, Ltd.*, *supra*; *Exchange Tel. Co. v. Gregory & Co.*, *supra*; *McDermott Co. v. Board of Trade* (C. C. A. 1906) 146 Fed. 964; *Kiernan v. Manhattan Quotation Tel. Co.*, *supra*; *Palmer v. DeWitt* (1872) 47 N. Y. 532; *Board of Trade v. Christie Co.*, *supra*; *National Tel. News Co. v. Western Union Tel. Co.*, *supra*; *Board of Trade v. Tucker*, *supra*; *Board of Trade v. Hadden-Krull Co.*, *supra*.

It is believed that this rule harmonizes all the cases where a complainant has appealed to equity for the protection of an incorporeal property right, not protected by law. The court sometimes grants relief on the basis of unfair competition as in *Montegut v. Hickson* (1917) 178 App. Div. 94, 164 N. Y. Supp. 858, (see criticism in 17 *Columbia Law Rev.* 730). Whether the decision is to be supported on the ground taken by the court or not, it is submitted that it may be supported as a protection of a property right, published only to the extent made necessary by the nature of the business. Such a class of cases as is represented by *Stein v. Morris* (Va. 1917) 91 S. E. 177, where relief is denied, may be distinguished on the basis that there is no commercial embodiment of the idea, corresponding to the dress model in the *Montegut* case, *supra*, and to the news in the principal case.

¹A charitable institution is one devoted to the benefit of the public and from which those who conduct its activities receive no pecuniary benefit. So an institution maintained to provide, at reasonable cost, a home for working girls, *Thornton v. Franklin Square House* (1909) 200 Mass. 465, 86 N. E. 909, or a free hospital, is a charity and the latter does not lose its character because some of its patients pay regular fees. *Duncan v. Nebraska Sanitarium & Benevolent Ass'n.* (1912) 92 Neb. 162, 137 N. W. 1120; *Powers v. Massachusetts Homœopathic Hospital* (C. C. A. 1901) 109 Fed. 394; *Adams v. University Hospital* (1907) 122 Mo. App. 675, 99 S. W. 453. But a Y. M. C. A., *Chapin v. Holyoke Y. M. C. A.* (1896) 165 Mass. 280, 42 N. E. 453, or an employees' mutual benefit society is not a charity. *Coe v. Washington Mills* (1889) 149 Mass. 543, 21 N. E. 966; but *cf. Fire Ins. Patrol v. Boyd* (1888) 120 Pa. 624, 15 Atl. 553.

The conflicting theories² which have been advanced to support this exception have led to a chaos of decisions which make difficult the determination of the extent of the immunity. In the recent case of *Goodman v. Brooklyn Hebrew Orphan Asylum* (App. Div. 2nd Dept. 1917) 165 N. Y. Supp. 949, the court pointed out that such immunity did not extend to protect the defendant from liability for injuries caused by servants whom it had selected without exercising due care.³

In considering this exemption it seems more profitable to inquire into the reasons for the rule in each class of acts than to analyze the various bases which have been proposed for the exception. The torts for which an eleemosynary institution might be sued may be divided into the following classes: (a) those arising out of its ownership of property and those committed by its servants (b) against a stranger and (c) against a beneficiary of the charity.⁴ Some courts, adopting the theory that the funds of the charity are trust funds and hence should not be depleted because of any wrongful act of the trustees or those acting under them, have refused, logically but very unreasonably, to make any distinction between the various kinds of torts and have granted absolute immunity from such liability.⁵ But this is not the general rule, and even in jurisdictions committed to the trust fund theory, this conclusion has not been accepted.⁶

Where fees are charged with the expectation of gain for the proprietors, *Green v. Biggs* (1914) 167 N. C. 417, 83 S. E. 553; *Richardson v. Dumas* (1914) 106 Miss. 664, 64 So. 459, the institution is not a charity, even if the charter of the organization contemplates charitable work. See *Brown v. La Societe Francaise* (1903) 138 Cal. 475, 71 Pac. 516.

²For a discussion of the ground which have been given for the exception see 1 *Columbia Law Rev.* 485, 7 *Columbia Law Rev.* 353.

³An appeal was taken on exception to a dismissal by a lower court because the plaintiff's attorney, although he had alleged that the defendant was negligent in hiring its servants, did not mention this fact in his opening to the jury. The court held that the omission was immaterial and that a good cause of action was alleged. The case was remanded for trial.

⁴A charity is not liable for the acts of a doctor. He is not under its immediate control but acts in a position similar to an independent contractor. He is not a servant, nor are the nurses working under his immediate supervision. *Schloendorff v. New York Hospital* (1914) 211 N. Y. 125, 105 N. E. 92.

⁵In such jurisdictions it has been held that an institution was not liable for maintaining its building in a negligent condition, *Abston v. Waldon Academy* (1907) 118 Tenn. 24, 102 S. W. 35, for the negligence of its servants, *Fire Ins. Patrol v. Boyd*, *supra*, nor for employing servants known to be negligent. *Williamson v. Louisville Industrial School* (1894) 95 Ky. 251, 24 S. W. 1065.

⁶Liability has been imposed for the negligent injury to a mechanic working on the premises, *Bruce v. Central Methodist Episcopal Church* (1907) 147 Mich. 230, 110 N. W. 951, although the court expressly affirmed *Downes v. The Harper Hospital* (1894) 101 Mich. 555, 60 N. W. 42 which was decided on the theory that the funds of the charity should not be defeated because of the torts of the trustees of the fund. In *McDonald v. Massachusetts General Hospital* (1876) 120 Mass. 432, the trust fund theory was adopted, but in *Davis v. Central Congregational Society* (1880) 129 Mass. 367, recovery was allowed for a negligent injury. In its opinion at p. 372, the court said: "It makes no difference that no pecuniary profit or other benefit was received or expected by the society. * * * this defendant as an incorporated religious society and as an owner and occupier of the premises in question, is subject to all the duties and liabilities which are incident to the ownership and possession of real estate."

It would seem clear that a charity which owns a building leased for business purposes should be subject to the same duties as any other property owner.⁷ And where the property is used for the purposes of the organization, strangers invited upon the premises are entitled to the same protection as is required from any individual.⁸ The reasons would seem even stronger for protecting the rights of a stranger injured by the wrongful act of the servants of the institution.⁹ A person who does not voluntarily subject himself to the actions of the charities finds scant comfort in the realization that his injury was caused by the servant of the charitable institution and that he is, for that reason, without relief. To excuse a charity for such torts is a false policy, which encourages negligence and deprives the community of protection from wrongful acts.

The situation with regard to a beneficiary is quite different. He voluntarily enlists the aid of the institution and subjects himself to its care. There are reasons of policy which warrant the rule that a charity is not liable to him for the acts of its carefully selected servants.¹⁰ The doctrine of *respondeat superior* is itself founded on policy.¹¹ It is deemed a just and a wise rule that one who receives the benefits of his servants' acts should be responsible for them. In this case, however, the patient and not the charity receives the benefit of the servant's act, and in return for kindness he should not be allowed to hold the institution for a tort which it used reasonable care to

⁷*Cf. Stewart v. Harvard College* (1866) 94 Mass. 58.

⁸*Davis v. Central Congregational Church, supra*; *Hospital of St. Vincent of Paul v. Thompson* (1914) 116 Va. 101, 81 S. E. 13. Where a mechanic was injured because of the improper condition of a cellar in which he was hired to work, *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 92 N. E. 626; *contra, Wittacker v. St. Luke's Hospital* (1909) 137 Mo. App. 116, 117 S. W. 1189, and where a nurse was set to work and not warned that the patient suffered from a contagious disease, *Hewett v. Woman's Hospital Aid Ass'n.* (1906) 73 N. H. 556, 64 Atl. 190, or where an inmate was falsely imprisoned, *Gallon v. House of Good Shepherd* (1909) 158 Mich. 361, 122 N. W. 631, the institution was held liable.

⁹Liability is incurred through the negligence in a servant's driving the defendant's wagon, *Basabo v. Salvation Army Inc.* (1912) 35 R. I. 22, 85 Atl. 120, or ambulance. *Van Ingen v. Jewish Hospital of Brooklyn* (1917) 99 Misc. 657, 164 N. Y. Supp. 832; *Kellogg v. Church Charity Foundation* (1908) 128 App. Div. 214, 112 N. Y. Supp. 566, reversed on a question of fact 1911) 203 N. Y. 191, 96 N. E. 406. *Contra, Noble v. Hahnemann Hospital* (1906) 112 App. Div. 663, 98 N. Y. Supp. 605. Even if the institution be considered engaged in governmental activities because of its public service, it does not escape liability because municipal agencies acting independently retain their duty to the public. *O'Connell v. Merchants' & Police Dist. Tel. Co.* (1915) 167 Ky. 468, 180 S. W. 845. But if the hospital is operated by the government it incurs no liability for the negligence of its servants. *Smith v. State of New York* (1915) 169 App. Div. 438, 154 N. Y. Supp. 1003.

¹⁰*McDonald v. Massachusetts General Hospital, supra.* In *Power v. Massachusetts Homœopathic Hospital, supra*, the court denied plaintiff recovery on the ground that by accepting charity he had waived his right to recover for negligent treatment.

¹¹*Mechem Agency* (1st. ed.), § 734.

prevent.¹² In exempting the institution from liability, the law does not work a hardship, while it does encourage and assist the valuable work conducted under charitable auspices. But there is grave danger in excusing the exercise of care in the selection of employees, for negligence in that respect puts the beneficiary in a hazardous position and thereby destroys the value of the institution to the public. Consequently, it has been held that failure to act carefully in selecting the facilities and the persons through which the charity was to be administered rendered the institution liable for the injuries resulting therefrom.¹³

The reasons for excusing charitable institutions for torts apply only to the acts of servants to beneficiaries and immunity should not be extended farther. It is important to public safety that charities in other cases should not be relieved of the duty of exercising due care. It would be much less confusing and nearer to the sound rule if the court would consider the immunity of charitable institutions as the exception and not the general rule.

PAYMENT BY CHECK—ITS EFFECT UPON THE ORIGINAL OBLIGATION.—In the recent case of *Bates v. Duinell* (Neb. 1917) 174 N. W. 722, the defendant contracted orally to sell cattle to the plaintiff for \$5,000 and the plaintiff gave him a check for that amount. Later the defendant became dissatisfied and returned the check to the plaintiff without having presented it for payment. The plaintiff at the time the check was given had only \$1500 in the drawee bank, but the cashier testified that he would have paid the check if presented. In an action for damages for the non-delivery of the cattle it was held that the check did not constitute "payment" in the absence of agreement between the parties, and therefore the contract was within the Statute of Frauds.

Where the parties agree that a check shall be accepted as payment, it is well settled that their intention shall control.¹ But in the absence of such an agreement certain presumptions are held to govern in the

¹²"This limitation [of liability to failure to hire competent servants] is founded upon public policy, upon which the very doctrine of *respondere superior* itself may be said to be founded. * * * Much may be said against the soundness of this principle, and whether it would not be wiser to hold even public charitable institutions to a higher degree of care. But in this country it has been settled that for the promotion of works of humanity and for the greater good for the greater number that that is a sound public policy." Cohen, J. in *Ward v. St. Vincent Hospital* (1898) 23 Misc. 91, 50 N. Y. Supp. 463; overruled on another ground (1899) 39 App. Div. 674, 57 N. Y. Supp. 784.

¹³*Hoke v. Glenn* (1914) 167 N. C. 594, 83 S. E. 807; *St. Paul's Sanitarium v. Williamson* (Tex. Civ. App. 1914) 164 S. W. 36; see *Illinois Central Ry. v. Buchanan* (1907) 126 Ky. 288, 103 S. W. 372.

¹*Mutual Life Ins. Co. v. Chattanooga Savings Bank* (Okla. 1915) 150 Pac. 190. Norton, Bills and Notes (4th ed.) 25.

Where there is an unliquidated claim or a *bona fide* dispute with regard to the amount owned, the parties may effect an accord and satisfaction by agreeing to extinguish the obligation by the acceptance of a check, even if it is for a smaller amount. See *Decker v. Smith & Co.* (1916) 88 N. J. L. 630, 96 Atl. 915; *Canadian Fish Co. v. McShane* (1908) 80 Neb. 551, 114 N. W. 594. But if the claim is liquidated, such an agreement will not constitute an accord and satisfaction. *Eckert v. Wallace* (1907) 75 N. J. L. 171, 67 Atl. 76.

several situations where the question may arise. Where the creditor accepts the check of his debtor on account either of an antecedent² or a contemporaneous claim,³ it is presumably only conditional payment. The reason for this presumption is that the common law courts refused to take over the view which prevailed in the law merchant that an instrument was taken in place of cash.⁴ They did not regard the written obligation of the debtor as payment but reached a compromise by declaring the payment absolute only upon the collection of the paper. The acceptance of a check drawn by a third party, if endorsed by the debtor, is regarded as conditional payment whether taken for an antecedent⁵ or a contemporaneous claim.⁶ This presumption seems reasonable, since the debtor continues liable because he is endorser of the check. This circumstance would seem to negative the inference that the creditor accepted the check in absolute payment. But where the creditor takes the check of a third party for an obligation contemporaneously incurred and it is not endorsed by the debtor, the presumption is that he accepts it as absolute payment.⁷ The same reasoning applies in the case of a bearer instrument or of one endorsed in blank by the payee. It is considered that the creditor contracts to accept the obligation of a third party on which the debtor is not liable as endorser, rather than the obligation of the debtor himself, and, therefore, he must rely solely on the instrument. This view does not apply to the case where the original obligation was antecedent, for in that case the instrument is regarded merely as additional security and not a part of the agreement of the parties with regard to payment.⁸

²*People's Bank and Trust Co. v. Walthall* (Ala. 1917) 75 So. 570; *Szwento Juozupo Let Draugystes v. Manhattan Savings Inst.* (1917) 178 App. Div. 57, 164 N. Y. Supp. 498. Even if the drawer has the check certified the presumption is merely that he has given additional assurance that the check will be paid and it is still only conditional payment. *Cullinan v. Union Surety, etc. Co.* (1903) 79 App. Div. 409, 80 N. Y. Supp. 58; *Born v. First National Bank* (1890) 123 Ind. 78, 24 N. E. 173. When the payee or holder has the check certified he accepts the obligation of the bank alone and relieves the drawer from liability. *Minot v. Russ* (1892) 156 Mass. 458, 31 N. E. 489; see *Born v. First National Bank*, *supra*; *Neg. Inst. Law* § 188 (N. Y. § 324). In Massachusetts and Maine a check is presumed, in the absence of evidence to the contrary, to be absolute payment. See *American Malting Co. v. Souther Brewing Co.* (1907) 194 Mass. 89, 80 N. E. 526; *Spitz v. Morse* (1908) 104 Me. 447, 72 Atl. 178.

³*Globe Express Co. v. Taylor* (1916) 61 Colo. 430, 158 Pac. 717.

⁴See 2 Ames, Cases on Bills and Notes, 874.

The attitude of the law courts to the law merchant in this matter is expressed by Lord Holt in referring to a bearer instrument made by a third party given on account of an antecedent debt: "But I am of opinion, and always was (notwithstanding the noise and cry, that it is the use of *Lombard Street*, as if the contrary rule would blow up *Lombard Street*) that the acceptance of such a note is not actual payment." *Ward v. Evans* (1703) 2 Ld. Raym. 928.

⁵*Board of Education v. Fonda* (1879) 77 N. Y. 350; *Cox v. Hayes* (1897) 18 Ind. App. 220, 47 N. E. 844; see *Churchill v. Yeatman-Gray Grocer Co.* (1914) 111 Ark. 529, 164 S. W. 283.

⁶See *Bailey v. Riffe* (W. Va. 1916) 90 S. E. 791.

⁷*Gibson v. Tobey* (1871) 46 N. Y. 637. It would seem clear however that a creditor has a right to insist on payment in money and therefore that an offer of a check is not a valid tender. *Reeves Realty Co. v. Brown* (1915) 45 Okla. 737, 147 Pac. 318.

⁸See *Norton, op. cit.* 27-28.

In determining the intention of the parties, their conduct and the surrounding circumstances are evidence to show under what terms the check was accepted.⁹ If it is received in absolute payment it discharges the obligation¹⁰ whether presented for payment or not¹¹ and the creditor cannot later sue on the original cause of action.¹² Even where the check is only conditional payment it is a thing of value until proved otherwise. Before the holder is entitled to recover from the drawer he must show presentment and dishonor.¹³ In the meantime his remedy on the original cause of action is considered suspended to revive or be extinguished according as the check is dishonored or paid on presentment.¹⁴ Thus in a suit on the original debt it is a good defense that the debtor has given a check, which has not been presented.

There are circumstances, however, which excuse presentment as against the drawer. Where there are no funds to the drawer's account in the bank,¹⁵ or where he has withdrawn them before the presentment of the check,¹⁶ or where the amount of the check is greater than the amount of the deposit,¹⁷ presentment would be useless and it is dispensed with. But it has been held that if the drawer has reason to believe his check will be honored though he may have no balance to his credit, he is entitled to presentment, demand and notice before being sued.¹⁸ Where the president or cashier of the drawee bank testified that the check would have been paid on presentment, although the drawer's funds were insufficient, it has been held that the evidence was immaterial and presentment unnecessary.¹⁹ As between holder and endorser, however, presentment must be made even though the drawer has no funds on deposit before the endorser can be held liable.²⁰

Whether a check is payment within the Statute of Frauds, is not clearly settled. It seems clear that where the parties agree that it should be absolute payment it satisfies the statute.²¹ But there is a difficulty when the instrument is merely conditional payment. Since

⁹Rohrbach v. Hammill (1913) 162 Ia. 131, 143 N. W. 872.

¹⁰Equitable National Bank v. Griffin & Skelley Co. (1896) 113 Cal. 692, 45 Pac. 985.

¹¹Rose v. Lilly (Ark. 1914) 170 S. W. 483.

¹²Cochran v. Slomkowski (1905) 29 Pa. Sup. Ct. 385.

¹³Daniel, Negotiable Instruments (6th ed.) § 1586; see McLure v. Sherman (C. C. 1895) 70 Fed. 190; Neg. Inst. Law, § 70 (N. Y. § 130).

¹⁴First National Bank v. McConnell (1908) 103 Minn. 340, 114 N. W. 1129; People's Bank and Trust Co. v. Walthall, *supra*.

¹⁵Culver v. Marks (1890) 122 Ind. 554, 23 N. E. 1086.

¹⁶See Haynes v. Wesley (1901) 112 Ga. 668, 37 S. E. 990.

¹⁷Industrial Trust, etc. Co. v. Weakley (1894) 103 Ala. 458, 15 So. 854.

¹⁸Hamlin v. Simpson (1898) 105 Ia. 125, 74 N. W. 906. Neg. Inst. Law § 79 (N. Y. § 139).

If the creditor is guilty of laches in presenting the check whereby the drawer suffers loss, the debtor is discharged. Watt v. Gans & Co. (1897) 114 Ala. 264, 21 So. 1011. See Industrial Bank of Chicago v. Bowes (1897) 165 Ill. 70, 46 N. E. 10. It was formerly the rule that laches in presenting the check for payment discharged the drawer regardless of loss to him, and this is still the rule with regard to endorsers. See First National Bank v. Currie (1907) 147 Mich. 72, 110 N. W. 499.

¹⁹The principle is that the bank has no legal right to permit the drawer to overdraw his account. Culver v. Marks, *supra*.

²⁰Start v. Tupper (1908) 81 Vt. 19, 69 Atl. 151.

²¹Summers v. Wood (Ark. 1917) 198 S. W. 692.

a check possesses value and passes current *in lieu* of money until its dishonor it seems reasonable to hold that a check is payment within the Statute of Frauds.²² The opposite view would encourage rather than prevent fraud.

Applying these principles, it is submitted that the instant case is improperly decided. Upon receiving the check, the defendant was under a duty to present it to the bank before he could say there was no sufficient payment within the Statute of Frauds.

VALIDITY OF CONTRACTS TO RESUME MARITAL RELATIONS.—The law with regard to contracts to resume marital relations involves two main considerations. Since each spouse owes to the other the obligation of *consortium*, contracts to resume marital relations will be wanting in consideration unless either the obligation has been destroyed or there is some other valid consideration. And further, society has developed its own views as to the desirability of the marital state, and in imposing these views the courts will frown upon contracts which make entrance into marriage more difficult or escape therefrom more facile.

Where the wife consents to resume marital relations and to dismiss a valid divorce suit there can be no question that forbearance to prosecute the action is ample consideration for the husband's promise.¹ But from the proposition that marriage imposes on each spouse the legal duty to continue the relationship, it has been argued that a bare promise to do so is merely an undertaking to perform that which the spouse is already obligated to perform.² This reasoning is incorrect for a spouse may be relieved from the obligation to maintain the relation.³ The proper test, therefore, of the resumption of the relation as consideration is whether one spouse had the right to leave or remain apart from the other at the time the contract was made.⁴ The waiver of this right constitutes a valuable consideration either for a promise by the husband⁵

²²McLure v. Sherman, *supra*. Contra, Groomer v. McMillan (1910) 143 Mo. App. 612, 128 S. W. 285.

¹Adams v. Adams (1883) 91 N. Y. 381; Polson v. Stewart (1897) 167 Mass. 211, 45 N. E. 737.

²See Miller v. Miller (1887) 78 Iowa 177, 35 N. W. 464 "neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is bound to do by the general law or by a subsisting contract with the other party." Pollock, Contracts, (3rd ed.) 203. In the noted case of Merrill v. Peaslee (1888) 146 Mass. 460, 16 N. E. 271, the court held by a bare majority that the conjugal *consortium* could not be bartered for money and therefore mere condonation could not constitute valid consideration. This decision created some uncertainty as to the validity of condonation as consideration, see Fisher v. Koontz (1899) 110 Iowa 498, 80 N. W. 551; Duffy v. White (1897) 115 Mich. 264, 73 N. W. 363, and its principle has been declared contrary to right and justice. Mack v. Mack (1910) 87 Neb. 819, 128 N. W. 527. Within its own jurisdiction the case is strictly limited by subsequent decisions. Polson v. Stewart, *supra*; Terkelson v. Peterson (1914) 216 Mass. 531, 104 N. E. 351.

³Sample v. Sample (1908) 82 Neb. 37, 116 N. W. 953; 1 Bishop, Marriage, Divorce and Separation § 1517.

⁴Burkholder's Appeal (1884) 105 Pa. 31; Moayon v. Moayon (1903) 114 Ky. 855, 72 S. W. 33.

⁵Burkholder's Appeal, *supra*.

or for a promise by a third party.⁶ On the other hand, where no legal cause for separation has arisen, the resumption of marital relations cannot constitute consideration, and a promise given in consideration of such resumption is unenforceable.⁷

Even though the contract be supported by a valid consideration the courts, on grounds of public policy, will not enforce it if it affords an incentive for future separation.⁸ When, on the other hand, the agreement tends to restore a disrupted family,⁹ and especially when it provides a penalty for future misconduct,¹⁰ the weight of authority is in favor of its validity. This was the situation in the recent case of *Bowden v. Bowden* (Cal. 1917) 167 Pac. 154, in which the wife agreed to return to her husband and dismiss a well-founded divorce action in consideration of a promise by the husband to pay a stipulated sum on his committing another act which would be the basis for a divorce. The court correctly upheld the contract on the ground that it did not offer any premium to the husband to bring about a separation but on the contrary placed a penalty upon it. It is thought that a contract whereby a husband and wife are brought together after a separation tends to restore harmony between them¹¹ even though the agreement contain provisions as to future separation on the recurrence of conditions that caused the original dissension.¹² Nevertheless, some courts refuse to enforce such contracts on the ground that the marital relation should not become the subject of barter and that reconciliation should be ascribed to motives of greater ethical weight than pecuniary inducements.¹³ But inasmuch as compromise is generally encouraged¹⁴ and the law favors the continuance of an established marriage,¹⁵ it is

⁶*Mack v. Mack*, *supra*; *cf.* *Brown v. Brine* (1875) L. R. 1 Ex. D. 5.

⁷*McKay v. McKay* (Tex. Civ. Ap. 1916) 189 S. W. 520; *Kesler's Estate* (1891) 143 Pa. 386, 22 Atl. 892.

⁸In a contract contemplating the reconciliation of husband and wife, a provision to the effect that the husband should pay the wife a sum less than half his yearly income in full satisfaction of all claims against his estate, in the event that they be divorced, was held void on the ground that the insignificance of the burden placed upon the husband tended to induce him to give a cause for divorce. *Pereira v. Pereira* (1909) 156 Cal. 1, 103 Pac. 488; *cf.* *Watson v. Watson* (1906) 37 Ind. App. 548, 77 N. E. 355. On similar reasoning a contract which stipulates for the payment of a valuable consideration conditioned on any separation is invalid. *Cocksedge v. Cocksedge* (1844) 14 Sim. *244.

⁹*Adams v. Adams*, *supra*; *Jodrell v. Jodrell* (1815) 9 Beav. 45.

¹⁰"It [the law] favors the reconciliation of husband and wife. A contract for the re-establishment of a ruined home is one which equity is swift to approve. Whether the contract in question is contrary to public policy is not to be determined from one clause of it, but from the whole instrument. The contract as a whole does not tend to produce estrangement between husband and wife. They were already estranged. The contract brought them together, and, taken as a whole, it is in aid of the marital relation, and is therefore not opposed to public policy, but in accord with it." *Woodruff v. Woodruff* (1906) 121 Ky. 784, 789, 90 S. W. 266, 268. *Duffy v. White*, *supra*, *accord*.

¹¹See *Woodruff v. Woodruff*, *supra*.

¹²*Woodruff v. Woodruff*, *supra*; *Terkelson v. Peterson*, *supra*.

¹³*Merrill v. Peaslee*, *supra*; *Fisher v. Koontz*, *supra*; see *Oppenheimer v. Collins* (1902) 115 Wis. 283, 91 N. W. 690.

¹⁴*McClure v. McClure* (1893) 100 Cal. 339, 34 Pac. 822.

¹⁵See *H. v. W.* (1857) 3 K. & J. 382.

difficult to justify a doctrine that impedes a husband and wife in settling their difficulties.¹⁶

¹⁶While the law favors the settlement of controversies between all other persons, it would be a curious doctrine which would forbid husband and wife to compromise their differences, or preclude them from forgiving a wrong committed by the other." *Adams v. Adams*, *supra*, at p. 384. To the same effect, see *Moayon v. Moayon*, *supra*; *Barbour v. Barbour* (1892) 49 N. J. Eq. 429, 24 Atl. 227, reversed on other grounds in (1893) 51 N. J. Eq. 267, 29 Atl. 148. However, an agreement to resume marital relations will not be enforced when it is in fraud of creditors, *Oppenheimer v. Collins*, *supra*, when it is made directly between husband and wife in a jurisdiction in which they may not lawfully contract, *Bolyard v. Bolyard* (W. Va. 1917) 91 S. E. 529; but *cf.* *Cahill v. Martin* (1879) 5 L. R. Ir. 227, or when it is unfair, since the relationship of the parties requires the utmost good faith. *Howell v. Howell* (1914) 42 Okla. 286, 141 Pac. 421; *cf.* *Duffy v. White*, *supra*.

RECENT DECISIONS.

FRANCIS GOERTNER, *Editor-in-Charge.*

ADMINISTRATIVE LAW—INTERSTATE COMMERCE COMMISSION—UNCERTAINTY OF ORDERS.—The Interstate Commerce Commission found that passenger fares between East St. Louis, Ill., and other Illinois points were lower than the lawful interstate rates between St. Louis, Mo., and Illinois points, and thus discriminated against the St. Louis interstate traffic (See 41 I. C. C. R. 13, 41 I. C. C. R. 503). The Commission ordered the railroad to prevent the undue preferences found to result from the contemporaneous maintenance, between Illinois points, of fares which in combination with other fares permitted by the Commission would produce a discrimination against interstate commerce. *Held*, this order was rendered inoperative through uncertainty. *Illinois Central Ry. v. Public Utilities Comm. of Illinois* (1918) 38 Sup. Ct. 170.

The federal commerce clause gives the commission power to limit the state police power of regulating intrastate rates to bounds which exclude discrimination against interstate commerce arising from the inter-relation of interstate and intrastate rates. *Houston & Texas Ry. v. United States* (1914) 234 U. S. 342, 355, 34 Sup. Ct. 833, 838; see *Minnesota Rate Cases* (1913) 230 U. S. 352, 33 Sup. Ct. 729; 14 Columbia Law Rev. 583. But the power of the Commission dominates only so far as it must be exercised to remove an existing discrimination within a definite territory. *American Exp. Co. v. Caldwell* (1917) 244 U. S. 617, 625, 37 Sup. Ct. 656, 661. Consequently, an order in which the uncertainty extends to the territory and rates to be affected may be declared invalid as beyond the power or jurisdiction of the commission; but not if it may be made certain by reference to the reports of the commission, *St. Louis & Southwestern Ry. v. Samuels & Co.* (C. C. A. 1914) 211 Fed. 588, 593, or by reference to a railroad map. *American Exp. Co. v. Caldwell*, *supra*. Assuming, however, that the order is within the jurisdiction of the administrative body, it must specify with certainty the action to be taken, before the individual becomes liable for a failure to act; for where a duty to act is similarly placed upon an individual by a statute, *Cook v. State* (1901) 26 Ind. App. 278, 59 N. E. 489; *People v. Briggs* (1908) 193 N. Y. 457, 86 N. E. 522; Lewis' Sutherland, *Statutory Construction* (2nd ed.) § 86; *cf.* Freund, *Standards of American Legislation*, 222-5, a decree, *Lyon v. Blotchford* (N. Y. 1881) 25 Hun. 57; *cf.* *Cotter v. Midland Ry.* (1848) 17 L. J. Ch. 235; *New York etc. R. R. v. Interstate Commerce Comm.* (1906) 200 U. S. 361, 404, 26 Sup. Ct. 272, 282, a judgment, *cf.* *Turner v. Dupree's Adm'r.* (1851) 19 Ala. 198, or a sentence, *In re Moore* (1897) 14 Ohio C. C. 237, 243, no one honestly in doubt is liable for a failure to act, and the court may declare the statute or decree entirely void or respectively interpret or modify it in its discretion. But the individual must act in good faith, *Sullivan v. Judah* (N. Y. 1834) 4 Paige 444, and take advantage of any administrative appeal or other opportunity given to determine the meaning of the order; *cf.* *People ex rel. Day v. Bergen* (1873) 53 N. Y. 404, 410; and a decree may specify only the general result to be achieved, leaving to the indi-

vidual the determination of the means to be employed. *Carpenter v. Easton R. R.* (1877) 28 N. J. Eq. 390; *Village of Kenesaw v. Chicago etc. R. R.* (1912) 91 Neb. 619, 136 N. W. 990. Thus uncertainty as to the proper method by which a carrier may remove the discrimination, *i. e.*, by lowering the interstate rate, raising the intrastate rate, or by taking a mediate position, is permissible. *American Exp. Co. v. Caldwell, supra*, 625. In the instant case, however, the uncertainty of the order would permit it to be annulled on both the above grounds: as beyond the commission's jurisdiction: and as failing properly to specify the action to be taken.

ADMIRALTY—SALVAGE OF NEUTRAL VESSEL BY NAVAL FORCES.—A Swedish vessel with a cargo belonging to the French government was halted by a German submarine, the crew abandoning the vessel. Two British trawlers, on official patrol duty, routed the submarine, and upon the refusal of the master and crew to return to the ship, towed it to a port of safety. *Held*, the officers and crew were, as against the vessel, entitled to salvage. *The Carrie* [1917] P. 224.

Since the purpose of salvage is to encourage the saving of property at sea by those who are under no duty to do so, it follows that where such duty is present there can be no salvage award. Kennedy, *Civil Salvage* (2nd ed.) 28, *et seq.* But the disability to earn salvage is limited to the extent of the duty, so that where a seaman, *The Two Friends* (1799) 1 C. Rob. 271, 278, passenger, *Towle v. The Great Eastern* (D. C. 1864) 24 Fed. Cas. No. 14,110, pilot, *Akerblom v. Price* (1881) 7 Q. B. D. 129, or public officer, *Le Tigre* (1820) 15 Fed. Cas. No. 8,281, goes beyond the obligation imposed upon him either by law or by contract, he is entitled to occupy the position of a salvor. Undoubtedly, there exists a certain amount of services which a warship must give to merchantmen of its own nationality, *The Francis and Eliza* (1816) 2 Dods. 115; *Smith v. The Josephine* (D. C. 1847) 22 Fed. Cas. No. 13,069, *aff'd. The Josephine* (1851) 13 Fed. Cas. No. 7,546, but where the services go beyond such limits, the officers and crew are entitled to salvage. *The Cargo ex Ulysses* (1888) 13 Prob. Div. 205. Salvage has been allowed to war vessels for services to ships of other nationalities, *Robson v. The Huntress* (C. C. 1851) 20 Fed. Cas. No. 11,971, and this principle has been properly applied in the instant case. Ordinarily, rescuing a ship from capture, is governed by the rule of military salvage, but where, as in the principal case, the ship is rescued both from perils of the enemy and from perils of the sea, civil salvage may also be allowed. *The Louisa* (1813) 1 Dods. 317.

BANKS AND BANKING—DEPOSIT FOR A SPECIAL PURPOSE.—A railroad deposited money with defendant bank for the purpose of paying the interest on the bonds of a certain date to the holders of the bonds. The deposit was known as "Coupon Account". There were several deposits under the same account. The bank defends an action by the receiver of the railroad to recover the balance of the money as assets of the corporation, on the ground that the deposits were "special" and resulted in a trust for the benefit of the bondholders. *Held*, the receiver could recover since there was only a debtor and creditor relation between the bank and its depositor. *Noyes v. First National Bank* (App. Div. 1st Dept. 1917) 167 N. Y. Supp. 288.

The ordinary relationship between a bank and its depositor, arising from a deposit of money in a bank depends, in the absence of an expressed intention, upon business usage. If the parties intend that the identical bills or coin deposited are to be returned, *Fogg v. Tyler* (1912) 109 Me. 109, 82 Atl. 1008, or if there is an agreement that the money be held in trust by the bank, *Madison Trust Co. v. Carnegie Trust Co.* (1915) 215 N. Y. 475, 109 N. E. 580, the deposit is "special", and the bank is a bailee or a trustee. *Rogers etc. Works v. Kelly* (1882) 88 N. Y. 234. But if the bank accepts a deposit in the usual course of business, it becomes a debtor and the depositor a creditor, since the bank is tacitly permitted to mingle the money with its own funds, and the obligation is to return a like amount on demand. *Foley v. Hill* (1848) 2 H. L. C. *28. Moreover, banks are in business for the purpose of using the money of their customers for the benefit of the bank, which fact ordinarily would preclude the implication of a trust. See *Foley v. Hill, supra*. A difficulty arises, however, where there is a deposit for a particular purpose, as to meet a note. Such a transaction, it is submitted, should not be distinguished from the ordinary general deposit, for the bank still intends to use the money and to pay out a like amount in accordance with the instructions given. *In re Barned's Banking Co.* (1870) 39 L. J. Ch. 635; see *Bank v. Higbee* (1885) 109 Pa. 1308; 1 Morse, Banks & Banking (5th ed.) § 210. It can at most give rise to a superadded contract which prevents the use of the debt due for any other purpose. *Dolph v. Cross* (1911) 153 Iowa 289, 133 N. W. 669. But some jurisdictions, especially New York, have held that a deposit for a particular purpose conclusively shows an intention that the bank should become a fiduciary and keep the identical bills for the purpose designated. *Titlow v. Sundquist* (C. C. A. 1916) 234 Fed. 613; *Holland Trust Co. v. Sutherland* (1904) 177 N. Y. 327, 69 N. E. 647. Such a conclusion would result in holding a bank and the cashier guilty of embezzlement or larceny if the money deposited were paid out. *People ex rel. Zotti v. Flynn* (1909) 135 App. Div. 276, 120 N. Y. Supp. 511; cf. *People v. Meadows* (1910) 199 N. Y. 1, 92 N. E. 128. This rule has been rightly limited, it seems, to a single deposit for a special purpose; but where, as in the instant case, there are several deposits over a long space of time, though for a single purpose, there could be no such intention to hold the identical moneys for the purpose, and the ordinary relationship of debtor and creditor has been held to have arisen. *Staten Island etc. Club v. Farmers' Loan & Trust Co.* (1899) 41 App. Div. 321, 58 N. Y. Supp. 460.

CARRIERS—INTERSTATE COMMERCE—CONSIGNOR'S RIGHT TO RECOVER FOR OVERCHARGES.—The Interstate Commerce Commission, having found the rate charged for the transportation of hardwood lumber excessive, ordered a reduction in price and reparation to the parties injured to the extent of the excess. In an action by the plaintiff, consignor, to recover the amount due, *held*, that even though the increased rate may ultimately have been borne by the purchaser of the goods and not by the plaintiff, yet he may recover from the carrier. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.* (1918) 38 Sup. Ct. 186.

Upon the establishment by the carrier of a schedule of tariffs in conformity with the Interstate Commerce Act, the transportation rate to be charged ceases to be a matter for negotiation. *Baltimore & Ohio R. R. v. La Due* (1908) 128 App. Div. 594, 112 N. Y. Supp. 964; *Texas*

etc. Ry. v. Mugg (1906) 202 U. S. 242, 26 Sup. Ct. 628. Consequently, if a carrier through its agent misquotes the published rate for the interstate transportation of a commodity, and an undercharge thereby results, the amount undercharged can be recovered from the consignor, *Baltimore etc. Ry. v. New Albany Box, etc. Co.* (1911) 48 Ind. App. 647, 94 N. E. 906; *Georgia R. R. v. Creety* (1909) 5 Ga. App. 424, 63 S. E. 528, or from the consignee. See 17 Columbia Law Rev. 553. It would not be a defense to such an action to assert that the carrier is estopped by the act of its agent from repudiating its contract, inasmuch as, the contract upon which the consignor relies is in itself illegal. *Louisiana Ry. & Nav. Co. v. Holly* (1911) 127 La. 615, 53 So. 882; *Baltimore etc. Ry. v. New Albany Box etc. Co., supra*. In accordance with the same reasoning, a consignor is entitled to recover overcharges, resulting from the imposition of an unreasonably excessive rate, irrespective of the profits accruing from his business, or the fact that he has taxed the consignee for the overcharge. See *New York etc. R. R. v. Ballou & Wright* (C. C. 1917) 242 Fed. 862; *Burgess v. Transcontinental Freight Bureau* (1908) 13 I. C. C. R. 668, 680; *Kindelon v. Southern Pac. Co.* (1909) 17 I. C. C. R. 251, 254. Reparation is due to the party who was required to pay the excessive charge as the price of transportation, and it is an immaterial issue, whether or not a court of equity will compel the consignor to hold the amount recovered in trust for the consignee. See *Nicola, etc. Co. v. Louisville, etc. R. R.* (1908) 14 I. C. C. R. 199.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LIMITATION OF ACTIONS.—Where the state legislature passed a statute, limiting to 60 days the time within which a tax could be contested, the plaintiff attacked the tax on the ground that it was both illegal and unconstitutional. *Held*, that a plaintiff could be denied relief after the statutory period had elapsed, and was not thereby deprived of his property without due process of law. *Morgan's Louisiana, etc. Co. v. Tax Collector* (La. 1917) 76 So. 606.

Statutes are frequently found in which it is provided that objections to assessments must be made within some short space of time, and if not so made shall be deemed to be waived, *Loomis v. City of Little Falls* (1903) 176 N. Y. 31, 68 N. E. 105, the intention of the legislature being to provide a prompt and speedy method of determining the validity of the assessment and the proceedings leading thereto, so that securities based on such assessments be reasonably free from subsequent impeachment. See *Loomis v. City of Little Falls, supra*; 2 Page and Jones, Taxation by Assessment, § 918. Such provisions are treated as statutes of limitation, *City of Denver v. Campbell* (1905) 33 Colo. 162, 80 Pac. 142, and have been held to be constitutional and not violative of the requirement of due process of law, *Lent v. Tillson* (1887) 72 Cal. 404, 14 Pac. 71 aff'd., 140 U. S. 316, 11 Sup. Ct. 825, on the ground that the plaintiff is not thereby deemed to have waived any of his rights under the federal constitution. *Turner v. New York* (1897) 168 U. S. 90, 18 Sup. Ct. 38. Such waiver extends only to mere irregularities in procedure or to the illegality of the tax because of nonconformity with the state statute, *Howell v. City of Tacoma* (1892) 3 Wash. 711, 29 Pac. 447; see *Ramish v. Hartwell* (1899) 126 Cal. 443, 58 Pac. 920, but it does not include objections under the federal constitution. If the decision in the principal case stands for the proposition that a failure to interpose objections within the statutory period is a waiver of all defects which are merely formal

it can be supported, but if it be taken to mean that the legislature may limit the time in which the question of constitutionality may be raised, as the court seems to intimate, the decision is questionable.

CONSTITUTIONAL LAW—VALIDITY OF STATUTORY PRESUMPTION.—The defendant was convicted under a federal statute which provided that the possession of opium should be deemed sufficient evidence to authorize conviction, unless the accused should explain such possession to the satisfaction of the jury. It further provided that on or after July 31, 1913, all smoking opium should be presumed to have been imported after April 1, 1909, on which date the importation of opium was prohibited. The plaintiff assailed the constitutionality of these provisions. *Held*, that the statute was valid. *Ng Choy Fong v. United States* (9 C. C. A., 1917) 245 Fed. 305.

The weight of authority sustains the power of the legislature to prescribe rules of evidence, in both civil and criminal cases, *Mobile etc. R. R. v. Turnipseed* (1910) 219 U. S. 35, 42, 31 Sup. Ct. 136; *State v. Thomas* (1906) 144 Ala. 77, 40 So. 271, since there is no vested right in such rules. *Meadowcroft v. People* (1896) 163 Ill. 56, 45 N. E. 303; Cooley, Const. Lim. (7th ed.) 524. This power is, however, subject to certain limitations. No rule of evidence may be enacted, which makes one fact *prima facie* evidence of another, unless there is such a relationship between the fact proved and the fact presumed that the latter may reasonably be inferred from proof of the former; *People v. McBride* (1908) 234 Ill. 146, 171, 84 N. E. 865; *Mobile etc. R. R. v. Turnipseed*, *supra*; nor may any presumption be made conclusive, if the party is thereby deprived of his constitutional right to an opportunity for a trial. *Missouri, K. & T. Ry. v. Simonson* (1902) 64 Kan. 802, 68 Pac. 653; Cooley, *op. cit.* 526; 2 Columbia Law Rev. 493. The constitutionality of statutes similar to the one in the instant case, providing that upon proof of certain facts criminal intent may be inferred, is now established. *United States v. Yee Fing* (D. C. 1915) 222 Fed. 154; *People v. Cannon* (1893) 139 N. Y. 32, 34 N. E. 759. It is to be noted that such statutes do not operate to deprive the accused of the so-called presumption of innocence, but merely create a presumption of guilty knowledge, *Board of Comm'rs of Excise etc. v. Merchant* (1886) 103 N. Y. 143, 8 N. E. 484; *People v. Cannon*, *supra*; 2 Wigmore, Evidence, § 1354 (3), the effect of which, like that of any true presumption, is merely to shift the burden of going forward with evidence. But the prosecution is not thereby released from the burden of establishing its case. *Commonwealth v. Williams* (1856) 72 Mass. 1. The principal case, therefore, is sound, inasmuch as the rule of evidence prescribed by the legislature affords the defendant a fair opportunity to submit his defense to the jury.

CONTRACTS—INADEQUACY OF CONSIDERATION—BASTARDS.—In a bastardy proceeding pursuant to statute it appeared that before the commencement of the action the defendant had prevailed upon the plaintiff to accept twenty-five dollars in full satisfaction and discharge of said action. *Held*, that the former contract being founded upon an inadequate consideration was not a bar to the present suit. *Burr v. Phares* (W. Va., 1917) 94 S. E. 30.

The rule is well settled that if there be any consideration the court will not inquire into the adequacy of it, *Brooks v. Haigh* (1840) 10

A. & E. 309, 323; *Earl v. Peck* (1876) 64 N. Y. 596; see *Lawrence v. McCalmont* (1844) 43 U. S. 426, save in case of payment or promise of payment of one sum of money for an obligation to repay a different sum. *Shepard v. Rhodes* (1863) 7 R. I. 470. Furthermore, equity treats gross inadequacy of consideration as corroborative evidence of fraud or undue influence, *Stephens v. Ozbourn* (1901) 107 Tenn. 572, 64 S. W. 902; cf. 9 Columbia Law Rev. 68, but it is the fraud and not the inadequacy of consideration which invalidates the contract. See 2 Pomeroy, Eq. Jur. (3rd ed.) § 927. The decision of the principal case therefore seems unsupportable on principles of contract. Contracts of this nature are held to require a fair and reasonable consideration, see *Black Hawk County v. Cotter* (1871) 32 Iowa, 125, and some courts have said that this requires the contract to be free from all suggestion of fraud and undue influence. See *Black Hawk County v. Cotter*, *supra*; *Ingwaldson v. Skrivseth* (1898) 7 N. D. 388, 75 N. W. 772. There being evidence of fraud in the principal case, the decision may be supported on this ground. Cf. *Hendrix v. People* (1881) 9 Ill. App. 42. This requirement may also be taken to mean that the settlement must be for an amount sufficient to prevent the child from becoming a public charge; see *Billingsley v. Clelland* (1895) 41 W. Va. 234, 23 S. E. 812; but since the mother cannot contract away the right of the public authorities to hold the father for the support of the child, if the statute gives them that right, *Sherman v. Johnson* (1848) 20 Vt. 567; see *Ingwaldson v. Skrivseth*, *supra*; *Billingsley v. Clelland*, *supra*, it appears that the court's departure from strict contract principles was unwarranted.

CORPORATIONS—PROMOTERS' CONTRACTS—ADOPTION.—The promoters of the defendant corporation, before its organization, contracted with the plaintiff that the corporation should issue twenty five shares of its stock to the plaintiff in consideration of services that he should render to it after its incorporation. The plaintiff performed the services, which were accepted by the corporation, with knowledge of the agreement between its promoters and the plaintiff, but the shares of stock were not issued. *Held*, one judge dissenting, the defendant corporation had adopted the contract and the plaintiff could recover from it for its breach. *Morgan v. Bon Bon Co.* (1917) 222 N. Y. 22, 118 N. E. 205.

A corporation is not bound by the contracts of its promoters on its behalf before its incorporation. *Tuttle v. Tuttle* (1906) 101 Me. 287; 64 Atl. 496; but cf. *Little Rock etc. R. R. v. Perry* (1881) 37 Ark. 164. Although it has been said that a corporation may ratify such contracts, see *Stanton v. New York etc. R. R.* (1890) 59 Conn. 272, 22 Atl. 300; *Bruner v. Brown* (1894) 139 Ind. 600, 38 N. E. 318, it is generally held that a technical ratification is impossible as there was no principal in existence at the time the contract was made. *McArthur v. Times Printing Co.* (1892) 48 Minn. 319, 51 N. W. 216; *Weatherford, etc. Ry. v. Granger* (1894) 86 Tex. 350, 24 S. W. 795. Again it has been said that a corporation may "adopt" the contract of its promoters, 1 Morawetz, Corporations (2nd ed.) § 548, but it would seem that the courts merely mean by this that the corporation may make a new contract on the same terms as the old one. *Howard v. Patent Ivory Co.* (1886) L. R. 38 Ch. Div. 156; *Battelle v. N. W. Cement & Concrete Pavement Co.* (1887) 37 Minn. 89, 33 N. W. 327; see *Penn Match Co. v. Hapgood* (1886) 141 Mass. 145, 7 N. E. 22. Where the services for which the

corporation promises to pay have been performed before its organization, there would seem to be, in the absence of a novation, no consideration for its promise. See 14 Columbia Law Rev. 450. But where, as in the principal case, the services are still to be performed no such difficulty arises. Although there may be some question whether as a matter of fact there was an "adoption", *i. e.*, a new contract, in the principal case, the conclusions of law stated by the court are clearly correct. *Weatherford etc. Ry. v. Granger, supra.*

CORPORATIONS—RIGHT TO PRACTICE LAW.—Employees of the defendant corporation prepared a bill of sale and a chattel mortgage, for which a fee was charged. An information was filed charging the defendant with violating New York Penal Law § 280 entitled "Corporations and voluntary associations not to practice law". *Held*, the defendant was practicing law within the meaning of the statute. *People v. Title Guarantee & Trust Co.* (App. Div. 2nd Dep't. 1917) 168 N. Y. Supp. 278.

Statutes have been passed in many states prohibiting corporations from acting as attorneys, furnishing attorneys, or giving legal advice. The basis of such legislation has been the disfavor with which bar associations have looked upon the entry of corporations into the field of the law, since it is inconsistent with the personal nature of the relation between attorney and client. See *In re Co-operative Law Co.* (1910) 198 N. Y. 479, 92 N. E. 15; 17 Columbia Law Rev. 78. Moreover, the courts have regarded the furnishing by a corporation of an attorney in its employ to one of its own customers as raising the added objection of divided allegiance of the attorney between the corporation and the client. *People v. People's Trust Co.* (App. Div. 1917) 167 N. Y. Supp. 767. The practice of law is not limited to actual appearance in court, but comprises the giving of legal advice, including the preparation of instruments by which legal rights are secured, *Hill v. Evans* (1905) 114 Mo. App. 715, 91 S. W. 1022; see *Eley v. Miller* (1893) 7 Ind. App. 529, 34 N. E. 836; *In re Duncan* (1909) 83 S. C. 186, 65 S. E. 210, and properly covers, it is submitted, the drawing of bills of sale and chattel mortgages. Since laymen may prepare legal papers and give advice with reference to legal questions, *Dunlap v. Lebus* (1901) 112 Ky. 237, 65 S. W. 441, except when they hold themselves out as lawyers, see *In re Lizotte* (1911) 32 R. I. 386, 79 Atl. 960; 18 Columbia Law Rev. 80, it would seem that in the absence of a statutory prohibition corporations could under the same restrictions as private individuals perform these services. But since the wording of the New York statute clearly prohibits corporations from giving legal advice the decision in the principal case appears to be justified. *Cf. Hall v. Bishop* (N. Y. 1869) 3 Daly 109.

EVIDENCE—PRESUMPTION OF MARRIAGE BETWEEN WHITE AND COLORED PERSONS.—A, a white man, cohabited with B, his former slave, from the close of the Civil War until her death in 1890. In a suit under a statute making conveyances by deed of gift to illegitimate children of more than one-fourth of the estate void, the plaintiffs seek to set aside certain conveyances made by A to the defendants, his children by B. *Held*, since there is a presumption of fact against the marriage of a white person with a negro, the defendants must prove their legitimacy. *Tedder v. Tedder* (S. C. 1917) 94 S. E. 19.

Generally speaking, cohabitation and general reputation raise a presumption of marriage, 1 Bishop, Marriage, Divorce, and Separation § 77; 4 Wigmore, Evidence § 2505 (1), especially where the bastardy of children is involved; since the policy of the law favors legitimacy and morality. *Teter v. Teter* (1884) 101 Ind. 129. But, when this presumption will result in holding a person guilty of a crime, such as bigamy, it is overcome by the counter presumption of innocence. *Bowman v. Little* (1905) 101 Md. 273, 61 Atl. 223, 657, 1084; *State v. Cooper* (1891) 103 Mo. 266, 15 S. W. 327; *Case v. Case* (1861) 17 Cal. 598. Accordingly, it has been held that, where miscegenation is a crime, as it is in most Southern states to-day, a marriage between a negro and a white person will not be presumed. *Armstrong v. Hodges* (1841) 41 Ky. 69; see *Oldham v. McIver* (1878) 49 Tex. 556. In the principal case, however, there was apparently no statutory impediment when the cohabitation began, and the reasoning of the bigamy cases cannot, therefore, be invoked. What few decisions on the point exist intimate that, where no criminality is involved, the presumption of marriage would arise; see *Dickerson v. Brown* (1873) 49 Miss. 357; *Bonds v. Foster* (1872) 36 Tex. 68; but none of these can be considered authority for the proposition. A Scotch court refused to presume a marriage between a noblewoman and her footman. See Bishop, *op. cit.* § 361. This situation is analogous to that of master and slave in this country. See *Armstrong v. Hodges, supra*; *Omohundro's Estate* (1870) 66 Pa. 113. Since the presumption under consideration is merely a rule of evidence, invoked to uphold what society regards as moral and decent, the principal case may readily be sustained, especially in view of the shock which bigamial marriages occasion to the moral sensibilities of a Southern community.

GIFTS—INTER VIVOS—SHARES OF STOCK.—The owner of shares of stock in a bank wrote to its president, expressing her intention of making a present gift of \$1,000 worth of said stock, and ordering him to make out and transfer to the intended donee a certificate for the same. He accepted the order, but suggested that a gift of \$1,000 in money be substituted. The owner died before anything further was done. *Held*, there was a valid gift *inter vivos* of the shares of stock. *Estate of Carter* (Pa. O. C. 1918) 35 Lancaster Law Rev. 89.

To constitute a valid gift *inter vivos*, two elements must be present: first, an intention to make a gift; second, a surrender by the donor of dominion over the subject matter of the gift, and an investiture of the donee with control over it. *Reese v. Philadelphia Trust Co.* (1907) 218 Pa. 150, 67 Atl. 124. This may be done by a manual tradition of the object to the donee, *Newman v. Bost* (1898) 122 N. C. 524, 29 S. E. 848, or to some third party for him; *Nolen v. Harden* (1884) 43 Ark. 307; but this is not the only mode of transfer. A gift of a chose in action, which is not susceptible of physical delivery, may be made if the donor does something which amounts to a virtual relinquishment of control over the property. *Commonwealth v. Crompton* (1890) 137 Pa. 138, 20 Atl. 417; Schouler, *Personal Property* (5th ed.) § 87; *cf. Grover v. Grover* (1837) 41 Mass. 261. So a transfer of shares of corporate stock, in the name of the donee, on the books of the company, by which legal title is vested in the transferee, will constitute such an act. *Roberts' Appeal* (1877) 85 Pa. 84. Even where the donor delivers the certificate of stock with a power of attorney, *Reese v. Philadelphia Trust Co., supra*, or only the stock certificate, in which

case a power of attorney is implied, *Bond v. Bean* (1904) 72 N. H. 444, 57 Atl. 340; *First Nat'l. Bank v. Holland* (1901) 99 Va. 495, 39 S. E. 126; *Gilkinson v. Third Ave. R. R.* (1900) 47 App. Div. 472, 63 N. Y. Supp. 792; *contra*, *Matthews v. Hoagland* (1891) 48 N. J. Eq. 455, 21 Atl. 1054, but does not make a transfer on the books of the corporation, the courts in the majority of American jurisdictions will consider it a valid gift. And this is sound on principle, since the donee either has been given legal title, or has the power to obtain legal title without further aid from the donor. See 17 Columbia Law Rev. 256. An assignment to the donee, with a power of attorney, but without the delivery of the certificates, has upon similar grounds been held effective as a present gift. *De Caumont v. Bogert* (N. Y. 1885) 36 Hun. 382. The court in the instant case seems to have properly applied the principle herein stated in holding that an assignment to the intended donee coupled with a power of attorney to a third person to transfer the stock constitutes a valid gift *inter vivos*.

INTOXICATING LIQUORS—LOCAL OPTION—INCORPORATION OF VILLAGE OUT OF DRY TERRITORY.—The village board of a village incorporated wholly out of territory dry by local option granted a license for the sale of intoxicating liquors therein. *Held*, that such license was void. *State ex rel. McKay v. Randall* (Wis. 1917) 165 N. W. 301.

The great weight of authority supports the decision in the principal case in holding that the result of the adoption of local option is to fix for the statutory period the status of the entire territory covered, *Higgins v. State* (1885) 64 Md. 419, 1 Atl. 876; *McGriff v. State* (1913) 66 Fla. 332, 63 So. 724; but *cf.* *State v. Donovan* (1910) 61 Wash. 209, 112 Pac. 260, this view having also received the support of the text-writers. See 1 Woollen and Thornton, Law of Intoxicating Liquors, § 548. In accord with this principle it has been held that, there being nothing to the contrary expressed, a greater political subdivision, *e. g.*, a county, will include a lesser, *e. g.*, a town within the county, in respect to the application of a local option law. *In re O'Brien* (1904) 29 Mont. 530, 75 Pac. 196; *cf.* *Ex parte Fields* (1898) 39 Tex. Cr. 50, 46 S. W. 1127. Similarly, a mere change of name will not alter the status of a subdivision, *State v. Cooper* (1888) 101 N. C. 684, 8 S. E. 134, nor a change of boundary, *Prestwood v. State* (1889) 88 Ala. 235, 7 So. 259, nor a change in the corporate form of government. *Smith v. Walker* (1909) 173 Ind. 239, 89 N. E. 862; but *cf.* *State v. Donovan*, *supra*. *A fortiori* the removal of part of a dry district does not affect the part which remains. *Jones v. State* (1887) 67 Md. 256, 10 Atl. 216. Although part of the subdivision in which local option is in force is annexed to another subdivision in which it is not, the local option law has been held to remain in effect in the part so annexed. *Ex parte Pollard* (1907) 51 Tex. Cr. 488, 103 S. W. 878; but *cf.* *Village of American Falls v. West* (1914) 26 Idaho, 301, 142 Pac. 42. It is submitted, therefore, that the holding of the principal case is sound and best expresses the intention of the legislature.

MASTER AND SERVANT—AUTOMOBILES—DANGEROUS INSTRUMENTALITIES.—The defendant rented an automobile from a garage owner for a period of three months, the rental price to include the services of a chauffeur. The chauffeur was to take all orders from the defendant. *Held*, the defendant was liable for injuries to a third person caused by the negli-

gence of the chauffeur in driving. *McNamara v. Leipzig* (App. Div. 1st Dept. 1917) 167 N. Y. Supp. 981.

Whether a general servant of an independent contractor becomes a servant of the contractee *pro hac vice* so as to make the contractee liable for the negligence of the servant is a question of fact and depends on the construction given to the contract. See *Linnchan v. Rollins* (1884) 137 Mass. 123; *Standard Oil Co. v. Anderson* (1908) 212 U. S. 215, 29 Sup. Ct. 252. The real problem is whether the contract of service is transferred or only the use and benefit of the servant's work. Cf. *Moore v. Palmer* (1886) 2 T. L. R. 781. In the cases of hired horse-drawn and motor vehicles, authorities are hopelessly conflicting on the question as to what degree of control must be exercised by the contractee over the driver to effect a change of service, but the presumption seems to be that the owner remains the master of the driver 1 Labatt, Master and Servant (2nd ed.) § 54. However, if the servant is wholly under the control of the contractee, he becomes the servant of the contractee. *Cain v. Hugh Nawn Contracting Co.* (1909) 202 Mass. 237, 88 N. E. 842; *Philadelphia, etc. Co. v. Barrie* (C. C. A. 1910) 179 Fed. 50. Apparently, on the facts of the case at hand, the chauffeur was the servant of the contractee. But see *Shepard v. Jacobs* (1910) 204 Mass. 110, 90 N. E. 392. Having once decided that the chauffeur was not a servant of the contractor, it would seem that the contractor cannot be held liable merely because he owned the machine. An automobile is not an agency so dangerous as to render the owner liable irrespective of the relation of master and servant between owner and driver. *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 338; *Jones v. Hoge* (1907) 47 Wash. 663, 92 Pac. 433, since the dangers incident to its use are the result of the conduct of those in charge of it and do not inhere in the construction and use of the vehicle. See *Steffen v. McNaughton* (1910) 142 Wis. 49, 124 N. W. 1016. But, notwithstanding this, the owner is liable for injuries to a third person if he rented the machine to another knowing that it was uncontrollable, as the machine thereby became a dangerous instrumentality. See *Texas Co. v. Veloz* (Tex. Civ. App. 1913) 162 S. W. 377.

MONOPOLIES—SHERMAN LAW—"THE RULE OF REASON"—SELLING LOSING BUSINESS.—A corporation, unable to continue its business without loss because of active but legitimate competition on the part of its only competitor, prays for modification of a previous injunction, so as to be permitted to sell out its plant as a going concern to such competitor, rather than to dispose of it as junk. *Held*, the prayer is granted, but an injunction previously in force against the prospective buyer is modified so as to require the buyer to continue to deal fairly with the public. *American Press Association et al. v. United States et al.* (7 C. C. A. 1917) 245 Fed. 91.

The above decision amounts to a holding that the courts shall apply "the rule of reason" to a statute which, on its face, purports to brand as illegal "Every contract, combination * * * or conspiracy, in restraint of trade" or as a criminal "Every person who shall monopolize, or attempt to monopolize, or combine or conspire * * * to monopolize any part of the trade or commerce among the several States". Sherman Anti-Trust Law, 26 Stat. 209, c. 647. Here, an act of combination which will result in a complete monopoly is permitted, because, in the opinion of the court, it will not unduly restrain trade; whereas in *Standard Oil Co. v. United States* (1910) 221 U. S. 1, 60,

31 Sup. Ct. 502, and *United States v. American Tobacco Co.* (1910) 221 U. S. 106, 179, 31 Sup. Ct. 632, where "the rule of reason" was first enunciated, it was entirely unnecessary for the decision of the cases to say that only undue or unreasonable restraint of trade was covered by the statute, for under any theory the combinations were illegal. Such *dicta* may have served a purpose in clearing away apprehension that the courts would interpret the statute literally, as indicated by unfortunate *dicta* in some of the earlier cases, see *United States v. Trans-Missouri Freight Ass'n.* (1897) 166 U. S. 290, 312, 17 Sup. Ct. 540, but all the cases previous to the 1910 decisions, in the actual results reached, show that not every contract or combination in restraint of trade was illegal, but that there must have been an element of illegality about such contract or combination as measured by some standard not to be found in the act itself. See *Cincinnati etc. Packet Co. v. Bay* (1906) 200 U. S. 179, 26 Sup. Ct. 208; also 23 *Harvard Law Rev.* 353 for a review of the cases up to 1909. This means that the cases were all decided under "the rule of reason", the courts reaching their conclusions as to what was "reasonable" restraint of trade by the same process as that employed by the common law courts to reach their conclusions when questions of restraint of trade within their jurisdiction are presented. The purpose of the Sherman Anti-Trust Law, as shown by the debates in Congress at the time, was to enable the federal government to handle restraint-of-trade cases because there was no federal common law. See *Standard Oil Co. v. United States*, *supra*, 50. In the principal case, *prima facie*, there is a contract in restraint of trade, because a competitor is eliminated. But, on two theories, the decision can be supported that such restraint is not unreasonable: first, that the competitor will in any event cease doing business, so that buying him out is a merely nominal restraint; second, that any undue restraint which might be caused by the resulting monopoly is to be avoided by the supervision of the court under the injunction. Whether the machinery of the equity court is adequate for proper supervision, over prices if not over methods of maintaining such monopoly, without relying on aid from the Federal Trade Commission, as recently done in *United States v. Mead* (not yet reported) 18 *Columbia Law Rev.* 137, is another question.

MORTGAGES—MERGER—EFFECT OF PURCHASE OF EQUITY OF REDEMPTION BY A MORTGAGEE WHO ASSIGNED SECURED NOTES.—The plaintiff in a foreclosure action was an assignee of notes secured by realty held by the defendant, who had acquired successively the mortgage and the equity of redemption. Further relief in the nature of an order for a temporary injunction restraining waste was asked. The court rejected the defence of merger of legal and equitable interests, and though refusing to grant an injunction gave the plaintiff proper relief. *Stewart v. Munger & Bennet* (N. C. 1917) 93 S. E. 927.

When the equity of redemption and the legal estate of the mortgagee meet under the common ownership of the mortgagee, the ordinary result is a merger of the lesser interest into the greater. Jones, *Mortgages* (7th ed.) § 870; *cf. Pearson v. Bailey* (1902) 180 Mass. 229, 62 N. E. 265. But the courts view this operation of merger vigilantly, and have interfered so frequently to prevent it that the rule of merger has been declared to be determined by the intention of the party in whom the interests are united. See *First Nat'l. Bank v. Essex* (1882) 84 Ind. 144. This intention is discovered by the circumstances of the particular

case and the expressions of the mortgagee, *Aetna Life Ins. Co. v. Corn* (1878) 89 Ill. 170; *Townsend v. Provident Realty Co.* (1905) 110 App. Div. 226, 96 N. Y. Supp. 1091; see *Anglo-Californian Bank v. Field* (1905) 146 Cal. 644, 80 Pac. 1080, and in the absence of other evidence, will be presumed according to the best interests of the mortgagee. *Stantons v. Thompson* (1870) 49 N. H. 272. Courts of equity, however, will disregard the intention of the mortgagee when the effect of merger would work injustice and hardship on the mortgagor, *cf. Noble v. Graham* (1904) 140 Ala. 413, 37 So. 230, or third parties. *Campbell v. Knights* (1844) 24 Me. 332. This effect of outstanding equities on the question of merger is illustrated by the instant case, where the equity of the holder of notes to have the benefit of the securities held by his assignor prevented the merger of legal and equitable interests meeting in the mortgagee assignor. The result of the decisions seems to be that merger is not dependent on the intention of the parties but is determined by a consideration of the conflicting equities which may exist in any particular case.

PLEADING AND PRACTICE—JUDGMENT AT LAW ON COMPLAINT DEMANDING EQUITABLE RELIEF.—The plaintiff's complaint alleged a partnership agreement as to the proceeds of a joint enterprise and prayed an accounting. The proof disclosed merely an agreement to compensate the plaintiff for services rendered. *Held*, the court cannot give a judgment for damages but must dismiss the complaint. *Jackson v. Strong* (1917) 222 N. Y. 149, 118 N. E. 512.

The codes adopted in most states have abolished the distinction between actions at law and suits in equity and have substituted a single form of "civil action". N. Y. Code Civ. Proc. § 3339; Cal. Code Civ. Proc. § 307. This change, however, is one in procedure only, and the distinction between legal and equitable rights and remedies still exists. Baylies, *Code Pleading and Practice* (2nd ed.) § 3; Pomeroy, *Code Remedies* (4th ed.) §§ 8, 9. The result is that a plaintiff may obtain any relief, legal or equitable, warranted by the allegations in his complaint. Hence, if he mistakes his remedy, *e. g.*, by praying equitable relief on a complaint stating a legal cause of action, he may succeed nevertheless. *Sternberger v. McGovern* (1874) 56 N. Y. 12; *White v. Lyons* (1871) 42 Cal. 279; *contra, Horn v. Ludington* (1873) 32 Wis. 73. Where facts arising from the same transaction call for both legal and equitable remedies, the complaint may be framed with a "double aspect". See *Stevens v. Mayor* (1881) 84 N. Y. 296. Both remedies may thereby be obtained; *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135; *Gray v. Dougherty* (1864) 25 Cal. 266; *contra, Supervisors v. Decker* (1872) 30 Wis. 624; or, if equitable relief is denied, legal relief may nevertheless be granted. *Herrington v. Robertson* (1877) 71 N. Y. 280. The above principles apply only where the defendant has interposed an answer; where judgment is given by default, it cannot be more favorable than that demanded in the prayer. N. Y. Code Civ. Proc. § 1207. In all of these cases, however, the allegations in the complaint fully sustained the remedy given. If the complaint is framed upon an equitable theory, which fails of proof, the authorities disagree as to whether judgment may nevertheless be had upon a legal cause of action disclosed by subsidiary allegations which are proved, the New York view being against such recovery. *Loeb v. Supreme Lodge* (1910) 198 N. Y. 180, 91 N. E. 547; *contra, Becker v. Superior Court* (1907) 151 Cal. 313, 90 Pac. 689; see *Jaeckel*

v. *Pease* (1898) 6 Idaho 131, 53 Pac. 399. But, where the facts alleged constitute an equitable cause of action only, and the proof discloses a legal cause of action, not alleged, the court can grant no relief except that warranted by the allegations. *Freeman v. Miller* (1913) 157 App. Div. 715, 142 N. Y. Supp. 797; cf. *Hayes v. Fine* (1891) 91 Cal. 391, 27 Pac. 772. This result may be justified under the doctrine that the defendant must not be surprised, and also upon the ground of variance. The principal case falls within the rule last discussed and is clearly sound.

PRINCIPAL AND AGENT—LOYALTY—WRONGFUL DISCHARGE.—The plaintiff, who was to receive commissions from a corporation on the proceeds of a sale to be made by the corporation to the defendant, entered the employment of the latter before the purchase price of the sale had been agreed upon. The plaintiff was dismissed, and in an action for wrongful discharge, the court instructed that he was absolved as a matter of law from disclosing his interest in the sale to the defendant, and refused to charge that actual fraud was unnecessary to justify the dismissal. *Held*, on appeal, that the trial court was in error on both points. *Marshall, Admx. v. Sackett & Wilhelms Co.* (App. Div. 2nd Dept. 1917) 168 N. Y. Supp. 259.

Since an employee cannot place himself in such a position that his interests may conflict with those of his employer, *Frances etc. Co. v. McKay* (1914) 37 Nev. 191, 141 Pac. 456; 1 Labatt, Master and Servant (2nd ed.) § 284, he is legally obligated to disclose any interest which would tend directly to place him in such a position before accepting employment in a confidential capacity. *Wells v. Cochran* (1915) 98 Neb. 725, 154 N. W. 245; *Dunne v. English* (1874) 31 L. T. (N. S.) 75. Moreover, the courts will protect the employer from the possibility of corruption as well as from actual corruption of the employee. *Hammond v. Bookwalter* (1895) 12 Ind. App. 177, 39 N. E. 872; see *Meek v. Hurst* (1909) 223 Mo. 688, 122 S. W. 1022. Consequently, it is the duty of an employee to refrain from engaging in a transaction which would tend in any manner to prevent him from giving disinterested advice to his employer in respect to matters within the scope of his employment. *Pearce v. Foster* (1886) 54 L. T. (N. S.) 664; *Priestman v. Bradstreet* (1888) 15 Ont. Rep. 558. Hence an agent is not permitted, in connection with transactions involving his discretionary authority, to bargain with a third party for secret commissions. *Federal etc. Co. v. Angehrn* (1910) 103 L. T. (N. S.) 150; *Morrison v. Ogdensburg etc. R. R.* (N. Y. 1868) 52 Barb. 173. This is true even though his employer suffers no pecuniary loss and though the agent is not in fact biased by his dealings with the third party. *Harrington v. Victoria etc. Co.* (1878) 39 L. T. (N. S.) 120; cf. *Wade v. William Barr Dry Goods Co.* (1911) 155 Mo. App. 405, 134 S. W. 1084. Therefore, an agent can maintain no action for secret commissions; *Harrington v. Victoria etc. Co.*, *supra*; and if he has already received them under a bargain therefor he will be compelled to hold them for the use of his employer. *Boston Deep Sea etc. Co. v. Ansell* (1888) 59 L. T. (N. S.) 345. It follows, that where an agent has engaged in any transaction, though it be single and isolated, prejudicial to his employer's interest, there is sufficient justification for a dismissal of the agent. *Boston Deep Sea etc. Co. v. Ansell*, *supra*. The decision in the principal case would, therefore, seem to be correct.

SALES—EQUITABLE LIEN—BILLS OF LADING AS SECURITY FOR TIME DRAFTS.—The defendant, in pursuance of an order, shipped goods to a firm in Buenos Aires taking out negotiable bills of lading. The National Park Bank discounted two ninety day drafts drawn by the defendant upon the vendee for the amount of the purchase price, and took the bills of lading duly endorsed as security. The vendee accepted the drafts and received the bills of lading from the bank. Subsequently both the defendant and the vendee became bankrupt and the latter returned the goods to the defendant. The bank made a motion to obtain possession of the goods upon the ground that they had an equitable lien upon them. Held, two judges dissenting, the bank had no lien. *Helburn Thompson Co. v. All Americas Mercantile Corporation* (App. Div. 1st Dept. 1917) 167 N. Y. Supp. 711.

The drawing of a time draft against a consignment implies a credit transaction and entitles the vendee to the bill of lading, which represents the goods, upon the acceptance of the draft. See *National Bank of Commerce v. Merchants Bank* (1875) 91 U. S. 92. Accordingly a party who discounts the draft has no right to require an acceptance of the draft without surrendering the bill of lading; and upon surrender of the bill of lading all his legal rights in the goods pass to the vendee. N. Y. Pers. Prop. Law § 114 (a), Uniform Sales Act § 33 (a); see *Gibson v. Stevens* (1850) 49 U. S. 384. The claim of the bank in the principal case, however, was that it had retained equitable rights in the goods. A contract to hold specific goods as security for the discharge of an obligation is specifically enforceable and will create an equitable lien upon the property charged. Jones, Liens (3rd ed.) § 30. The courts have often implied such agreements in favor of a party discounting a draft when the money was advanced upon a consignment without a delivery of the bill of lading. *Parker v. Baxter* (1879) 19 Hun 410, aff'd 86 N. Y. 586; *Flour City Bank v. Garfield* (N. Y. 1883) 30 Hun 579. But there is no basis for the implication of an equitable lien where the discounting bank receives the bill of lading. It is amply protected by virtue of the legal rights obtained, and when it does relinquish the security and accept the personal obligation of the consignee instead, it forecloses the inference that it intends to retain any rights in the goods; and this is even true where the bank had a right to hold the bill of lading until payment. The situation is analogous to that of a common law lienor, who, upon a voluntary surrender of the goods upon which he had the lien, lost all his rights, both legal and equitable, in the pledged property. *Bailey v. Quint* (1850) 22 Vt. 474; *Stickney v. Allen* (1858) 76 Mass. 352. It would seem, therefore, that the decision in the principal case is sound.

TORTS—DECEIT—PROMISE MADE WITHOUT PRESENT INTENTION TO PERFORM.—The defendant sold a jitney bus to the plaintiff, promising orally that if the plaintiff should be unable to secure sufficient business the defendant would secure it for him. The plaintiff, on learning that the defendant had never intended to do this, continued to use the car, but later brought this action for the rescission of the contract and damages. Held, the plaintiff by using the car after discovering the fraud had lost his right to rescission. The court intimated, however, that if the plaintiff had properly stated his cause of action he might have recovered in tort. *Fleming v. Gerlinger Motorcar Co.* (Ore. 1917) 169 Pac. 28.

The courts are divided as to whether an intention to deceive is essential to the maintenance of an action in tort for misrepresentation, but they all agree that where this intention is present the action will lie. Williston, Sales § 632; Chapin, Torts 411. In an action for rescission, however, a material misrepresentation, intentional or innocent, will support the bill. 15 Columbia Law Rev. 187. But if the statement is a promise or prophecy it is obvious that a present intention not to perform or a present lack of belief in the statement must be present in order that the statement should be a misrepresentation at all. *Field v. Seubert Bearing Co.* (1917) 167 N. Y. Supp. 294. Hence, in this class of cases it is immaterial whether the plaintiff proceed at law or in equity. Most courts have permitted an action for a deliberate misstatement of present intention on the ground that a promise to do something in the future embodies a representation of a present intention to perform. *McLean v. Southwestern Casualty Ins. Co.* (Okla. 1916) 159 Pac. 660; *McElrath v. Electric Investments Co.* (1911) 114 Minn. 358, 131 N. W. 380; cf. *Standard Elevator Co. v. Wilson* (1907) 218 Pa. 280, 67 Atl. 463. This present intention, although difficult of proof, is a fact, see *Edginton v. Fitzmaurice* (1884) 29 Ch. D. 459; *Adams v. Gillig* (1910) 199 N. Y. 314, 92 N. E. 670, and hence the case falls within the general rule that a deliberate misstatement of a past or present fact will support an action in tort. Chapin, *op. cit.* 397. Some courts have refused to adopt this view, *Farris v. Strong* (1897) 24 Colo. 107, 48 Pac. 963; *Tufts v. Weinfeld* (1894) 88 Wis. 647, 60 N. W. 992, because of the logical difficulty of separating the abstract present intention from the promise or prophecy. Their argument rests on metaphysical grounds which, although believed to be unsound, cannot flatly be contradicted, but certainly considerations of good policy and natural justice seem to lend support to the majority view.

USURY—EXCESSIVE INTEREST DEPENDENT UPON CONTINGENCY.—The defendant loaned a sum of money to the plaintiff in consideration of an assignment of an interest in a vested remainder, payable on the death of the life tenant. According to the mortality tables, the interest on the loan would exceed the legal rate, and actually did exceed it when the debt became due. *Held*, the transaction was not usurious in absence of an intention to take an usurious rate. *Hartley v. Eagle Ins. Co.* (Ct. of App. 1918) 58 N. Y. L. J. 1223.

Usury is the taking under contract of more interest for the use or forbearance of money than the law allows. Webb, Usury § 1. Consequently, when the lender stipulates for the repayment of the principal plus the highest legal rate of interest and for additional returns upon a contingency, the agreement is usurious, *Browne v. Vredenburg* (1870) 43 N. Y. 195; *Miller v. Life Ins. Co.* (1896) 118 N. C. 612, 24 S. E. 848, unless the contingency is within the borrower's control. *State v. Elliot* (1900) 61 Kan. 518, 59 Pac. 1047; *Taylor v. Buzzard* (1905) 114 Mo. App. 622, 90 S. W. 126. Since the usury laws apply only to interest for the use or forbearance of money, a rate of return for the loan which includes a fair compensation for other services is not usurious. *Matthews v. Cole* (1877) 70 N. Y. 239; see *Smith v. Wolf* (1881) 55 Iowa 555, 8 N. W. 429. Similarly, contracts which provide for rates exceeding that permitted by statute but which at the same time risk the repayment of the principal are not invalid, *Chesterfield v. Jansen* (1750) 1 Atk. 339; *Goodrich v. Rogers* (1882) 101 Ill.

523, on the ground that the excessive rate consists of payment both for the use and for the risk of the sum advanced; as for example, bottomry contracts, *Thorndike v. Stone* (1831) 28 Mass. 183, and life annuities. *In re Naish* (1830) 7 Bing. 150. But in every case there must be a reasonable chance that the principal may be lost, or the courts will construe the transaction as one intended to evade the usury laws. See *Missouri, etc. Trust Co. v. Krumseig* (1899) 172 U. S. 351, 19 Sup. Ct. 179. The question in the principal case is whether a contract which risks only the legalized return on the loan is within the usury laws, when it provides for a rate greater than that allowed by law, upon a contingency. As a matter of strict interpretation, the older decisions, holding such contracts to be usurious, seem correct, since the only risk involved is the return of the legal rate of interest, which is really no risk, for the amount represented thereby was never advanced by the lender. *Roberts v. Trenmayne* (1618) Cro. Jac. 507; *Smith v. Nicholas* (1837) 35 Va. 330. But the modern authorities have taken the opposite position, where there is no actual intention to evade the usury statute. *Clift v. Barrow* (1888) 108 N. Y. 187, 15 N. E. 327; see *Richardson v. Hughett* (1879) 76 N. Y. 55. From the point of view of good commercial policy which has for its object an unhampered exchange of money, the decision in the principal case, overruling a former holding, *Hall v. Eagle Ins. Co.* (1912) 151 App. Div. 815, 136 N. Y. Supp. 714, aff'd. 211 N. Y. 507, is commendable. The result reached may be thus analyzed: the principal advanced plus the maximum rate of interest becomes a new legalized principal, the risking of which in its entirety or in part takes it out of the laws of usury in the absence of a factual intention to evade those laws.

VENDOR AND PURCHASER—INNOCENT MISREPRESENTATION—RESCISSION OF CONTRACT—SPECIFIC PERFORMANCE.—The plaintiff in a suit for the return of deposit money and the rescission of a contract for the purchase of realty had bid on lots A and B relying on an innocent misrepresentation made by the auctioneer in regard to lot B. *Held*, although the plaintiff had contracted to buy lot A only because of his expectation of buying lot B, the misrepresentation concerning lot B was not ground for the rescission of the contract to buy lot A, since the contracts were not "complicated"; but it would defeat the defendant's counterclaim for specific performance. *Holliday v. Lockwood* [1917] 2 Ch. 47.

It is commonly accepted that a misrepresentation of a material fact, innocent or otherwise, inducing a contract for the sale and purchase of land will be ground either for interference by equity in allowing a rescission of the contract or for a refusal to grant specific performance. See *Bigham v. Madison* (1899) 103 Tenn. 358, 52 S. W. 1074; 15 Columbia Law Rev. 187. But as an exception to this, if the mistake is due to the carelessness of the one resisting the performance of the contract, and will not work great hardship, specific performance will be granted. *Tamplin v. James* (1880) L. R. 15 Ch. 215. However, since the exercise of the power of specific performance, unlike the jurisdiction over suits to rescind contracts, is entirely discretionary, equity may refuse to grant the vendor specific performance because of the resulting hardship, even though denying the vendee the right to rescind, see *Rudisill v. Whitener* (1907) 146 N. C. 403, 59 S. E. 995; *Welch Pub. Co. v. Johnson Realty Co.* (W. Va. 1916) 89 S. E. 707, and, therefore, an innocent misrepresentation may not be sufficient to

allow the vendee to rescind but sufficient to defeat the vendor's bill for specific performance. See *Welch Pub. Co. v. Johnson Realty Co.*, *supra*; Fry, *Specific Performance*, (5th ed.) § 652. This principle is illustrated by the instant case, where a misrepresentation in one of two "uncomplicated contracts", one contract not conditioned upon the other, did not give rise to a right to rescind the other, but was sufficient to defeat specific performance because of the unfairness and hardship which would result in granting this kind of relief to the party in the wrong. Some courts conveniently escape the difficulty presented by the "uncomplicated" contracts, by fastening upon any suggestion which would combine the two contracts and thereupon allowing a rescission. *Dykes v. Blake* (1838) 4 Bing. N. C. 463; *cf. Monds v. Birchell* (1908) 59 Misc. 287, 112 N. Y. Supp. 249.

VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT AGAINST SURVIVING TENANT BY THE ENTIRETY.—The plaintiff conveyed land by the entirety to the defendant and her husband, and took the husband's note for the purchase price. The husband died, leaving the note unpaid, and the plaintiff seeks to enforce his vendor's lien against the wife, who defends on the ground that she did not participate in the contract of purchase. *Held*, the lien could be enforced. *Moore v. Cary* (Tenn. 1917) 197 S. W. 1093.

Where the purchase price for land has not been paid upon conveyance, nor security taken for its payment, the courts in some jurisdictions will ordinarily imply an equitable lien. 2 Jones, *Liens* (3rd ed.) § 1061. It would not be profitable to make any further general statements since the decisions involving such questions as in what manner, in whose favor, and against whom this lien operates, are in hopeless conflict. 3 Pomeroy, *Eq. Juris.* (3rd ed.) § 1251, each case being governed by its particular equities. See *Fisk v. Potter* (N. Y. 1865) 2 Abb. App. Dec. 138, 140. The indefiniteness in scope of this lien is to a great extent due to the uncertainty of its origin. It has been held to arise out of considerations of natural equity, see *Fisk v. Potter*, *supra*, or out of the implied intention of the parties, *Wendell v. Pinneo* (1906) 127 Ill. App. 319, or to rest upon inadequacy of legal remedy, since at common law land was immune from attachment. See *Ahrend v. Odiorne* (1875) 118 Mass. 261. The right is not an estate in land, but a right to a lien in equity, see *Berger v. Berger* (1899) 104 Wis. 282, 80 N. W. 585; *Marchand v. Railroad* (1910) 147 Mo. App. 619, 127 S. W. 387; 3 Pomeroy, *op. cit.* § 1234, and is enforceable against all but innocent purchasers for value. Maitland, *Equity* 252; see *Acton v. Waddington* (1899) 46 N. J. Eq. 16, 18 Atl. 356; but see *Robinson v. Owens* (1899) 103 Tenn. 91, 52 S. W. 870, and judgment creditors without notice. 2 Jones, *op. cit.* § 1081; *Bayley v. Greenleaf* (1822) 20 U. S. 46; but see *Lissa v. Posey* (1887) 64 Miss. 352, 1 So. 500. Since the wife in the instant case was in the position of a volunteer she took the land subject to the lien, and it was, therefore, unnecessary for the court to base its decision on the ground that by accepting the deed, she had become a party to the purchase.

WILLS—TESTAMENTARY CHARACTER OF WRITING.—A decedent executed during his lifetime a written agreement providing for the renewal from year to year of certain notes made by him and for their payment upon his death. In the probate of a will made subsequent to this

contract, it was contended that the instrument provided for a testamentary disposition of property, and was, therefore, revoked by a clause in the will revoking all former wills. *Held*, that the agreement was not testamentary in character. *In re Eisenlohr's Estate* (Pa. 1917) 102 Atl. 117.

Courts are often confronted with the problem of determining whether a certain instrument which makes a disposition of a man's property to take effect after his death was intended to operate as a will. It is not enough for any document, in order to be a testament, to provide for the disposition of the property after the decease of the maker; there must be the *animus testandi*. *McBride v. McBride* (1875) 67 Va. 476. The form in which the writing is put, or the name given to it, or the belief of the maker as to its character, although entitled to some weight, is not, however, controlling. See *Ransom v. Pottawattamie County* (1915) 168 Iowa 570, 150 N. W. 657; *Daniel and Daniel, Adm'rs v. Veal* (1861) 32 Ga. 589. For an instrument to be testamentary as a matter of law, it must (disregarding instruments where only an executor or a guardian is appointed) make provision for the disposition of property to take effect after the testator's death, and it must be ambulatory in its nature. 1 Jarman, Wills (6th ed.) 27. But the fact that the enjoyment or possession of a certain right to property is postponed until after the death of the donor, or that a certain interest is contingent upon such death, does not constitute the instrument granting this interest a testament. See *Norak v. Lovin* (1916) 33 N. D. 424, 157 N. W. 297; 17 Columbia Law Rev. 245. If it passes a present interest, or is made irrevocable, it is not a testament; and this is the test which the courts have applied in interpreting particular writings. *Mooday v. Macomber* (1910) 159 Mich. 657, 124 N. W. 549. It has been uniformly held that a note payable at, or after the maker's death, is a valid note, and not a testament. *Beatty v. Western College* (1898) 177 Ill. 280, 52 N. E. 432; *Hegeman v. Moon* (1892) 131 N. Y. 462, 30 N. E. 487. The probable basis of such a conclusion is, that upon the execution of the note a present irrevocable interest in the chose in action passes to the payee, although the time for possession is to accrue at some future date. *Cf. Krell v. Codman* (1891) 154 Mass. 454, 28 N. E. 578; *Cover v. Stem* (1887) 67 Md. 449, 10 Atl. 231. Where, therefore, as in the principal case, the agreement provides for a discharge of the notes, upon the maker's death, it would appear that the effect is identical, *cf. Green v. Whaley* (Mo. 1917) 197 S. W. 355, *a fortiori*, where the notes are payable at the end of one year and are to be renewed from year to year. The decision seems, therefore, to be in harmony with the weight of authority.

BOOK REVIEWS.

FRANCIS GOERTNER, *Editor-in-Charge.*

THE LAW OF INTERSTATE RENDITION, ERRONEOUSLY REFERRED TO AS INTERSTATE EXTRADITION. By JAMES A. SCOTT. Chicago: SHERMAN HIGHT. 1917. pp. xiv, 534.

The author, reiterating the thought conveyed in his title, opens his text with the phrase, "Interstate rendition, frequently but inaccurately referred to as 'interstate extradition'." But, as if almost shrinking from the possible consequences of this audacious innovation, he proceeds to declare that, while he "fully realizes" that "such a radical change as the substitution of the word 'rendition' for the commonly used word 'extradition', may not be received with general favor, yet, accuracy and precision in the use of words demand the adoption of 'rendition'." Several pages farther on he graciously observes that the present reviewer, "in his book on 'International Extradition and Interstate Rendition', held to the same view."

In a play once much in vogue with the votaries of the comic stage, bearing, as the reviewer recalls it, the euphonious title "Our Boarding House", the leading roles were borne by two rival singers, who, with a view to exhibit their respective merits, alternately assailed with ever rising inflection the auditory nerves of their unfortunate fellow-lodgers. The reviewer trusts that he may not be suspected of harboring vocal ambitions, if he admits that almost a generation ago, in 1891, he did publish a treatise in two volumes, entitled, as he dimly recalls it, not "International Extradition and Interstate Rendition", but "Extradition and Interstate Rendition", the second volume of which was devoted to the latter subject. In this work, which has happily proved to be a fecund source of even unconscious inspiration and succor to subsequent writers, he ventured, not diffidently, but with full, aggressive confidence to expound, as he affirmed, "the fundamental difference between extradition and interstate rendition", and to introduce into the law the distinctive terminology again unfurled to the world by the present author. Declaring in his preface that, in his judgment, the "rendition" of fugitives from justice as between the components of the Union was "not properly described as extradition" he explained that, since "the accurate employment of terms" was "of the utmost importance", and the use of the word "extradition" invited the application of the principles of international law to the interstate proceeding, the second part of his work had been called "Interstate Rendition". This thought he also reiterated in the opening sentence of his second volume, explicitly asserting that, while the use of the term "extradition" in the interstate proceeding was "firmly established", it was "nevertheless inaccurate and misleading"; and from this point on, throughout the volume, he endeavored, by running title as well as argumentative demonstration, to impress the distinction and its connotation upon the profession. Not long afterwards, in *Lascelles v. Georgia*, 148 U. S. 537, the Supreme Court of the United States, which had not passed upon the point before,

sanctioned the distinction and adopted the reviewer's emblem of it, in an excellent opinion prepared by Mr. Justice Jackson, who had just then been called to that exalted stage. It is true that the learned justice, with that tendency to omission said to characterize "first appearances", neglected Paine's caution against undue preoccupation with plumage, and, while espousing the innovation, forgot to mention the author of it; yet the brief for the State of Georgia, with which the opinion exhibits an intimate acquaintance, abundantly quoted, with punctillious citation, the reviewer's then recent treatise; and the reviewer recalls with pleasure the circumstance that counsel for that State, before the case was decided, courteously sent him a copy of their brief, with an appreciative letter of acknowledgment. The learned justice moreover referred to "the clear opinion pronounced by Lumpkin, Justice," in the court below, which repeatedly cited the same treatise and adopted its terminology, as well as to the then recent case of *Comm. v. Wright* (Mass.), 33 N. E. 82, in which Chief Justice Field, adverting to the fact that Spear and the reviewer reached "opposite conclusions", sanctioned the latter's position and his use of the word "rendition".

The present work should prove to be useful both to lawyers and to administrative officials. It states and analyzes cases very fully, and embraces the latest decisions. No doubt the text would often have been susceptible of condensation, but, as the volume is not cumbersome, this is a defect less serious than would have been that of oversight or material omissions. Nearly a third of the work is devoted to a reprint of the statutes of the several states, to which are added those of Alaska and Porto Rico, on the subject under consideration. Such a collection is convenient for the practitioner. It is followed by a table of cases.

J. B. Moore.

A TREATISE ON THE LAW OF INHERITANCE TAXATION. By LAFAYETTE B. GLEASON and ALEXANDER OTIS. New York: MATTHEW BENDER & Co. 1917. pp. lxiii, 836.

The construction of a statute common to many states, even though the wording of the act is substantially the same, will differ according to the theories which the various courts have in regard to the subject matter. This is especially true in reference to taxation statutes where no benefit is conferred upon the *res* subject to the tax. An inheritance tax is in a measure confiscatory, depriving the beneficiaries of a decedent's bounty of a portion of the gift. Hence there arises a conflict between the upholders of individual freedom and the right of absolute ownership of property, and those who subscribe to the view that the state has an active interest in the accumulation of wealth, and, therefore, is entitled to a part of such accumulation. Such is the effect of a tax on inheritance, although the theory upon which the levy is upheld is that the state having granted the right to bequeath and to inherit, may place a price upon that privilege.

In the recent work compiled by Messrs. Gleason and Otis, neither view is urged. Very little attempt is made to discuss the theory of the rules applied, or to prophecy as to the solution of the difficult problems which are arising or may arise. The volume is one for the use of busy practitioners whose chief desire is the most recent decisions as well as the leading cases construing the statute. With this view in

mind the authors have arranged the book so that the material is readily accessible, giving cases and holdings in the various jurisdictions, the statutes and forms required, as well as lists of the corporations whose stocks are and are not subject to the tax, and a list of the Commissioners in each state. The position of the authors as attorney for the State Comptroller for New York City, and their evident familiarity with the actual application of the statute makes the book of great value as a reference book.

BOOKS RECEIVED.

INCOME TAX LAW AND ACCOUNTING. 1918. By GODFREY N. NELSON. NEW YORK: MACMILLAN Co. 1918. pp. xxiv, 364.

INCOME TAX PROCEDURE FOR 1918. By ROBERT H. MONTGOMERY. New York: RONALD PRESS Co. 1918. pp. x, 800.

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By JAMES SCHOULER. Fifth Edition. New York: MATTHEW BENDER & Co. 1918. pp. xci, 886.

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THE EQUITABLE RIGHTS AND LIABILITIES OF STRANGERS TO A CONTRACT.

In the case of a contract for the sale of a *res*, for the breach of which legal damages would not be adequate, it is well settled in most jurisdictions that either party to the contract may have specific performance of it. It is also a general rule that the assignee of the vendor or the vendee may have the specific performance of the contract, and that the transferee of the *res* which is the subject of the contract, unless he can clothe himself with the defense of purchase for value, takes the *res* subject to the equitable duty to carry out the contract. Where, however, the contract is not a contract to sell but relates to the doing or abstention from a particular act, or the plaintiff acquires his right in the contract through some process other than formal assignment, neither the rules of decision nor the theory of rights and liabilities are so clearly worked out. It is the purpose of this article to give some consideration to the legal theories on the basis of which strangers to a contract, specifically performable in equity, acquire rights and are subject to liabilities with respect to it.

I.

LIABILITIES OF STRANGERS TO THE CONTRACT.

It was in connection with the attempt to impose restrictions upon the use of land that the possibility of subjecting others than the promisor to the performance of the obligation of a contract received the first and most important development.

Whenever the owners of neighboring plots of land wished to impose restrictions on the use of one plot so as to affect the use

or enjoyment of the neighboring plot by its owner or possessor, the common law afforded three devices by which this result might be accomplished:

(a) If the ownership of both plots was in one person, he might convey one plot, reserving in his favor a right of entry upon condition broken, the condition being that the land conveyed should not be used in a particular manner so as to affect the use of the plot retained.

(b) The owner of one plot upon conveying it might reserve or he might acquire by grant from the neighboring owner an easement for the benefit of the other plot.

(c) The owner of one plot might acquire a covenant from the owner of the other that the latter's land should not be used in a particular way.

Each of these devices, so far as the law courts were concerned, could effect the desired result only in a limited and imperfect manner, and each for historical reasons was subject in varying degree to technical and to some extent artificial rules. All must be effected by the operation of instruments under seal.¹ None of them were applicable to property other than legal interests in land. The law courts afforded no remedy by which they could direct or compel the actual or literal performance of the restriction by the owner of the servient tenement. And in the case of easements and restrictive covenants, the right of the owner of the dominant tenement was restricted to the recovery of damages only for its invasion. The owner of the dominant tenement could not annex his right of entry for condition broken to his land nor could he sell, assign, or devise it.² Upon his death the right passed to his heirs, but they took not by descent but by representation.

The common law easement could be created only in a limited class of cases, the law not favoring the creation of new forms of easement not known to the early common law.³ When reserved

¹*Right of entry reserved upon condition broken.* Marshall County High School Co. v. Iowa Evangelical Synod (1869) 28 Iowa 360. *Easement.* Hewlins v. Shippam (1826) 5 Barn. & Cress. 221; Foster v. Browning (1856) 4 R. I. 47; Trammell v. Trammell (S. C. 1858) 11 Rich. L. 471. *Covenants running with the land,* see Boston & Albany R. R. v. Briggs (1882) 132 Mass. 24.

²Upington v. Corrigan (1896) 151 N. Y. 143, 45 N. E. 359.

³Cockson v. Cock (1607) Cro. Jac. 125; Keppell v. Bailey (1834) 2 My. & K. 517, 535; Ackroyd v. Smith (1850) 10 C. B. 164; Hill v. Tupper (1863) 2 Hurl. & Colt. 120.

There is not entire agreement as to the true nature of the negative easement, whether it is a property right vested in the owner of the domi-

in favor of a dominant tenement, the easement was annexed to it by operation of law and passed to the subsequent takers of the land, the burden of it passing to all subsequent takers of the servient tenement. This was true even where the holder of the servient tenement was a disseisor,⁴ since the disseisin operated only to put an end to the seisin of the prior owner, and did not in itself affect the rights of the owner of the dominant tenement which were not dependent upon seisin. Where, however, the easement was in gross, *i. e.*, reserved in favor of one who had retained no land, it could not be transferred, nor did it burden the land in the hands of subsequent takers.⁵

The restrictive covenant gave rise to legal rights in the covenantee to recover damages for a breach of the covenant by the covenantor. Where the covenant "touched and concerned the land", the benefit of it passed to subsequent takers of the dominant estate,⁶ but the passing of the burden of the covenant to the subse-

nant tenement similar to the right in a positive easement, or a right originating in covenant. See *Kine v. Jolly* [1905] 1 Ch. 480, 487; *Washburn, Easements and Servitudes* § VI 5. In early law the remedy for interfering with the negative easement was the writ of nuisance. 3 Holdsworth, *History of English Law* 129. The right to a negative easement could be acquired by prescription. *Cross v. Lewis* (1824) 2 Barn. & Cress. 686; *Aldred's Case* (1612) 9 Coke 58b; *Renshaw v. Bean* (1852) 18 Q. B. 112, 131; *Sury v. Pigot* Pop. 166, *s. c.* *Shury v. Pigot* (1626) 3 Bulst. 339. In a proper case, a negative easement may be created by implied grant on the application of the principle that a grantor cannot derogate from his grant. *Palmer v. Fletcher* (1665) 1 Lev. *122; *Cox v. Matthews* (1674) 1 Vent. 237; *Rosewell v. Pryor* (1704) 6 Mod. *116; *Tenant v. Goldwin* (1705) 6 Mod. *311; *Swansborough v. Coventry* (1832) 9 Bing. 305; see also *Phillips v. Low* [1892] 1 Ch. 47. The doctrine of the acquisition of negative easements by prescription has not been favored in the United States, see *Washburn, op. cit.*, § VI 18, but for cases where negative easements were held to be created by reservation, see *Peck v. Conway* (1876) 119 Mass. 546; *Rector, etc., Episcopal Church v. Mack* (1883) 93 N. Y. 488; *Cooper v. Louanstein* (1883) 37 N. J. Eq. 284, and by grant, *Brooks v. Reynolds* (1870) 106 Mass. 31; *Tooth v. Bryce* (1892) 50 N. J. Eq. 589, 25 Atl. 182; *Lampman v. Milks* (1860) 21 N. Y. 505. These cases, as well as the fact that the doctrine of negative easements was well established in English law long before the equitable development of *Tulk v. Moxhay* (1848) 2 Ph. 774, seem to establish that the negative easement was essentially a right in the land, originating in grant, rather than a right arising out of implied covenant.

⁴See *Chudleigh's Case* (1589-95) 1 Coke 120a, 122a; *In re Nisbet & Potts' Contract* [1905] 1 Ch. 391, *aff'd.* [1906] 1 Ch. 386; *Alexander City, etc., Co. v. Central of Ga. Ry.* (1913) 182 Ala. 517, 62 So. 745; *Le Blond v. Town of Peshtigo* (1909) 140 Wis. 604, 123 N. W. 157.

⁵*Ackroyd v. Smith, supra*, footnote 3; *Hill v. Tupper, supra*, footnote 3; see *infra*, footnote 66.

⁶See *Rogers v. Hosegood* [1900] 2 Ch. 388; *Nicoll v. Fenning* (1881) 19 Ch. Div. 258; *Duke of Devonshire v. Brookshaw* (1899) 81 L. T. R. (N. S.) 83; *cf. Onward Bldg. Society v. Smithson* [1893] 1 Ch. 1, 12 (*semble*).

quent takers of the servient tenement was much more limited in its operation. To entitle the covenantee or his transferee to maintain an action against the transferee of the covenantor at law it was necessary, according to the English law at least, that there should be tenure between the plaintiff and the defendant,⁷ or in some jurisdictions the covenant must relate to or be in support of an easement existing between the land of the plaintiff and that of the defendant.⁸

From the foregoing brief summary, it is apparent that the legal rules relating to servitudes were highly technical in character and limited in their application. The rights of the parties would vary very materially, depending upon the particular category into which their rights fell, and the determination of this question often involved niceties of interpretation, since the rights of the plaintiff would turn upon the question whether the language of the deed of conveyance should be deemed to be a covenant, a reservation of a right of entry, or a reservation or grant of an easement.⁹

It was the province of equity through its doctrines of specific performance to expand the law of restrictions upon the use of property much more completely and scientifically than it had been developed by the law courts. The processes by which courts of equity effected this expansion of the law are more exactly adapted to the formulation of legal rules in conformity to an enlightened morality than were the methods employed by the law courts in developing the law of servitudes, and it is the purpose of this article to trace in outline the development of the equitable doctrine with a view to ascertaining how far the so-called equitable easements or servitudes should be limited in their application by likening them to property rights in the land or to the common law rules relating to servitudes, rather than developed on principles originating in the courts of equity themselves.

All so-called equitable "easements" or "servitudes" have their

⁷*Keppell v. Bailey*, *supra*, footnote 3; see, *infra*, footnote 18.

⁸*Morse v. Aldrich* (1837) 36 Mass. 449, *aff'd.* 42 Mass. 544; *Nye v. Hoyle* (1890) 120 N. Y. 195, 24 N. E. 1; *Gould v. Partridge* (1900) 52 App. Div. 40, 64 N. Y. Supp. 870; *Gilmer v. Mobile & Montgomery Ry.* (1885) 79 Ala. 569; *Whittenton Mfg. Co. v. Staples* (1895) 164 Mass. 319, 41 N. E. 441; *Mott v. Oppenheimer* (1892) 135 N. Y. 312, 31 N. E. 1097; *Crawford v. Krollpfeiffer* (1909) 195 N. Y. 185, 88 N. E. 29; *Countryman v. Deck* (N. Y. 1883) 12 Abb. N. C. 110; *Lydick v. Baltimore & Ohio R. R.* (1880) 17 W. Va. 427.

⁹See *Cassidy v. Mason* (1898) 171 Mass. 507, 50 N. E. 1027; *Watrous v. Allen* (1885) 57 Mich. 362, 24 N. W. 104; *Post v. Weil* (1889) 115 N. Y. 361, 22 N. E. 145; *Los Angeles University v. Swarth* (C. C. A. 1901) 107 Fed. 798.

origin in contract, expressed or implied, and their nature and extent depends upon the extent to which equity will compel compliance with the contract, not only by and for the parties to it, but by and for third persons whose acts or omissions may in some way affect the rights acquired by the covenant or contract creating the servitude. If A and B are adjoining land owners and B promises for good consideration not to use his land in a particular way affecting the use and enjoyment of A's land, the case is a typical one for the equitable remedy of specific performance. Damages are inadequate both because of their speculative character and because the plaintiff cannot by the expenditure of the damages recoverable at law procure the particular thing stipulated for by the contract or its equivalent. The promise is one of which equity can compel specific performance and there are present, therefore, all the elements entitling the plaintiff to equitable relief by way of specific performance of his contract. If, however, B conveys his land to another upon what theory is his grantee or any subsequent taker affected by the obligation of B's contract? As we have seen, no subsequent taker was under any liability at law unless the contract was under seal, and under the English and some American decisions he was under no liability even if the contract was under seal.

In *Tulk v. Moxhay*,¹⁰ Lord Cottenham granted an injunction restraining the defendant, who took with notice, from acting in violation of the terms of a covenant entered into by his predecessor, undertaking to keep a garden on the covenantor's premises "in an open state uncovered by any buildings." The court, for the purpose of the decision, assumed that the defendant was not bound by the covenant at law and rested its conclusion upon the somewhat vague statement that the restriction was "an equity attached to the land by the owner." *Tulk v. Moxhay* has been very generally followed in the United States as well as in England, but there is no substantial agreement as to the theory upon which the burden of restrictive covenant is imposed upon subsequent takers of the covenantor's land. Some judges have been of the opinion

¹⁰*Supra*, footnote 3. In *Keppell v. Bailey*, *supra*, footnote 3, upon a similar state of facts, where Sir Edward Sugden argued in support of the doctrine that the covenant was a burden on the conscience of the taker, relief had been refused, but in *Whatman v. Gibson* (1838) 9 Sim. 196 and in *Mann v. Stephens* (1846) 15 Sim. 376, Vice-Chancellor Shadwell granted an injunction enforcing a restrictive covenant against a purchaser with notice from the covenantor. Knight Bruce, V. C., seems to have regarded the question as an open one in *Bristow v. Wood* (1844) 14 L. J. Ch. 50, and in *Moxhay v. Inderwick* (1847) 1 De G. & Sm. 708.

that the real explanation of *Tulk v. Moxhay* was that the covenant in that case was one running with the land at law, and that equity was exercising concurrent jurisdiction over the legal liability for which legal damages were inadequate.^{10a} Sir George Jessel in his often-quoted *dictum* in *London and South Western Ry. v. Gomm*,¹¹ said of *Tulk v. Moxhay*,

"The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* to another line of cases, or else an extension in equity of the doctrine of negative easement; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light."^{11a}

A number of English judges have explained the result reached in *Tulk v. Moxhay* on the ground that the restrictive covenant was a "burden on the conscience" of subsequent takers who were not purchasers for value.¹² The late James Barr Ames was of the opinion that the burden of the restrictive covenant was imposed on subsequent takers claiming under the covenantor to prevent their unjust enrichment.¹³ A more recent opinion which has received some support in the later opinions of the English courts is an extension of the suggestion made by Jessel in *London and South Western Ry. v. Gomm*, to the effect that the covenant creates an equitable property right or right *in rem* in the land of the covenantor which follows the land into the hands of all subsequent takers, except of course innocent purchasers.¹⁴ A recent writer on the subject reaches the conclusion that the doctrine "is a creation of equity which cannot, it is conceived, be supported upon any recognized principle."¹⁵

It is believed that none of these views conforms wholly to the results reached by the decisions, but that the doctrine that the burden of restrictive covenant "follows the land" into the hands

^{10a}See, *infra*, footnote 17.

¹¹(1882) 20 Ch. D. 562, 583.

^{11a}For judicial opinion containing similar statements see, *infra*, footnote 28. The latter alternative suggested by Jessel has found support in recent English decisions. See, *infra*, footnote 14.

¹²See, *infra*, footnote 36.

¹³17 Harvard Law Rev. 178, 183.

¹⁴17 Columbia Law Rev. 281, 285; *Formby v. Barker* [1903] 2 Ch. 539; *In re Nisbet & Potts' Contract*, *supra*, footnote 4; *London County Council v. Allen* [1914] 3 K. B. 642.

¹⁵Jolly, Restrictive Covenants 1.

of all but innocent purchasers is an application of the doctrine of equity which is generally recognized and consistently applied in the law of trusts and in the law of specific performance of contracts.

That the burden of the covenant does not run at law, since there is no tenure between the covenantee and the subsequent taker of the premises affected by the covenant, seems to be established by the English cases. This was the decision in *Keppell v. Bailey*.¹⁶ Lord Cottenham in *Tulk v. Moxhay* assumed that the covenant did not run at law, and although Jessel made an opposite assumption in 1880,¹⁷ the question seems to have been finally put at rest by the decision in *Austerberry v. Corporation of Oldham*.¹⁸ Moreover, it was settled that the burden of the covenant did not run at law so as to affect a sub-lessee of the covenantor,¹⁹ but equity, applying the doctrine of *Tulk v. Moxhay*, regards the sub-lessee as bound by the covenant regardless of the want of legal obligation on the part of the sub-lessee.²⁰ Only a covenant, that is to say a promise under seal, is deemed to run with the land at law, but equity will impose the obligation upon subsequent takers where the contract or agreement is not under seal.²¹ Moreover, in equity, burdens as well as benefits are deemed to affect equitable interests or "estates" in land, which of course were not subject to the legal rule.²² These cases make it clear that equity, in imposing a burden of restrictive covenants upon subsequent takers of the land, is doing something more than giving an equitable remedy based on a legal obligation, which runs with the land at law.

Nor is the doctrine of the equitable burden of restrictive covenants an extension in equity of the doctrine in *Spencer's Case*, as was suggested by Jessel. In *Spencer's Case*²³ it was held that the burden of the covenant touching and concerning the land

¹⁶*Supra*, footnote 3.

¹⁷*In re Mercer & Moore* (1880) 14 Ch. D. 287.

¹⁸(1885) 29 Ch. D. 750.

¹⁹See *Hall v. Ewin* (1887) 39 Ch. D. 74, 81; *South of England Dairies, Ltd., v. Baker* [1906] 2 Ch. 631 (*semble*).

²⁰*Hall v. Ewin*, *supra*, footnote 19; *John Brothers, etc., Co. v. Holmes* [1900] 1 Ch. 188; 1 Ames, *Cases on Equity Jurisdiction* 152 n. 1.

²¹*Lewis v. Gollner* (1891) 129 N. Y. 227, 29 N. E. 81; *Trustees of Columbia College v. Lynch* (1887) 70 N. Y. 440; *Tallmadge v. East River Bank* (1862) 26 N. Y. 105; *Hayward Homestead Tract Ass'n v. Miller* (1893) 6 Misc. 254, 26 N. Y. Supp. 1091; *Nottingham Patent Brick & Tile Co. v. Butler* (1886) 16 Q. B. D. 778.

²²*John Brothers, etc., Co. v. Holmes*, *supra*, footnote 20; *Rogers v. Hosegood*, *supra*, footnote 6.

²³(1583) 5 Coke 16a.

passed to the assignee of the leasehold at law. If equity had taken over this doctrine we should expect it to apply it as against those who had acquired equitable rights to, or, as it is said, had become equitable owners of the leasehold, and that the "equitable owner" would be bound by the covenant in equity in the same way that the legal owner is bound by the covenant in law. But such is not the rule. After some vacillation, it was finally settled by the English courts that a contract to assign a lease did not impose upon the contract purchaser of the leasehold either in law or in equity the obligation to perform the covenants of the lease.²⁴ Nor would equity at the suit of the covenantee compel the contract purchaser to take an assignment of the land and thus subject himself to the legal burden of the lease.²⁵

Nor will Professor Ames' suggestion, that the running of the burden is based on unjust enrichment, bear close scrutiny. He says,²⁶

"To incumber the *res* in the hands of the innocent purchaser for the benefit of the promisee would be to rob Peter to pay Paul. The situation is altogether different, if the *res* is acquired with notice of the restrictive agreement, or by a volunteer. If such a possessor were permitted to ignore the restrictive agreement, he would make an unmerited profit, and this profit would entail an undeserved loss upon the promisee. For the promisee in negative agreements, unlike the promisee in affirmative agreements, has no redress against the promisor. The latter did not violate the restrictive agreement while he was in possession of the *res*, and its violation by a subsequent possessor is no breach of contract by the promisor."

There is an occasional expression in the opinions indicating that the view that the running of the burden of the restrictive covenant in land is based on unjust enrichment has met with judicial favor.²⁷ To say, however, as Professor Ames does, that if the

²⁴*Moores v. Choat* (1839) 8 Sim. *508; overruling *Lucas v. Comerford* (1790) 1 Ves. Jr. 235 and *Flight v. Bentley* (1835) 7 Sim. 149; followed by *Cox v. Bishop* (1857) 8 De G. M. & G. *816 and *Purchase v. Lichfield Brewery Co.* [1915] 1 K. B. 184.

²⁵*Moores v. Choat*, *supra*, footnote 24.

²⁶17 *Harvard Law Rev.* 178.

²⁷Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." *Cottenham*, Lord Chancellor, in *Tulk v. Moxhay*, *supra*, footnote 3, at p. 778. "* * * the doctrine of *Tulk v. Moxhay*, properly

purchaser with notice were "permitted to ignore the restrictive agreement" he would make an unmerited profit, is to assume the very point to be determined. Clearly the profit is not unmerited unless the restriction is legally operative and upon some theory or other the purchaser is so acting as to invade the plaintiff's equitable right. Whether or not it is legally operative clearly must be determined before it can be said that there is want of merit in the purchaser's holding the land free from the restriction. Indeed, examples are not wanting in the books of cases where property has been bought at a low price on the assumption that it was subject to restriction and the courts have nevertheless determined that the buyer might hold his purchase free of the restriction.

If, therefore, we eliminate from consideration the several theories that equity gives relief, because the covenant is one burdening the land at law; that equity is only recognizing a legal right for the invasion of which legal damages are inadequate; that the doctrine is only an extension in equity of the doctrine in *Spencer's Case*; and that the burden runs upon the theory of unjust enrichment; there still remains for consideration the alternative suggestion made by Sir George Jessel, that the basis of the running of the burden of restricted covenants is an "extension in equity of the doctrine of negative easements,"²⁸ and this will require examination and comparison with analogous doctrines in the law of trusts and specific performance.

Where A holds property in trust for B, it is everywhere recognized that B has a right *in personam* against A. Originally, he had

applied, will enable him to enforce that right as against the Defendant—that is to say, considering that the Defendant obtained this public-house at a less rent, as we may assume he did, by reason of the covenant, we ought not, as against this person entitled to the benefit of that covenant, to allow him to deal with the public-house in a way inconsistent with the covenant by reason of which he got it at a lower rent." Cotton, L. J., in *Clegg v. Hands* (1890) 44 Ch. D. 503, 519. "If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction." Cotton, L. J., in *Hall v. Ewin*, *supra*, footnote 19, at p. 79. "The equity would seem to spring from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan, by which all the property is to be subjected to the restricted use, being carried out, and that while he is bound by and observes the covenant, it would be inequitable to him to allow any other owner of lands, subject to the same restrictions, to violate it." Green, V. C., in *De Gray v. Monmouth Beach, etc., Co.* (1892) 50 N. J. Eq. 329, 339, 24 Atl. 388.

²⁸For similar suggestions see *Norcross v. James* (1885) 140 Mass. 188, 192, 2 N. E. 946; *Trustees of Columbia College v. Lynch*, *supra*, footnote 21; *Joy v. St. Louis* (1890) 138 U. S. 1, 38, 39, 11 Sup. Ct. 243.

no right which could be invaded by third persons, and however extensively third persons interfered with the trust property or participated in any breach of trust, equity afforded him no remedy against anyone but the trustee.²⁹ Ultimately, equity did in many cases give relief against third persons, and in these cases where there was a breach of trust or a failure on the part of the trustee to perform the trust, the practical consequence of the equitable doctrine was the transformation of the right of the *cestui que trust* from a pure right *in personam* into a right *in rem* so far as the acts of third persons are concerned. The subject matter of the right, however, was the right of the *cestui* against the trustee, and not in the *res* held by the trustee for the benefit of the *cestui*. The suggestion sometimes made,³⁰ that the right of the *cestui* is an equitable property right in the trust *res* or, as is sometimes said, a right *in rem* in the trust *res* itself, is a convenient expression to describe many of the practical consequences of permitting the *cestui que trust* to assert his right to the trust property when it has found its way into the hands of third persons, but it does not describe the process by which that result is reached, nor does it afford adequate explanation for the want of liability of third persons to the *cestui* where the acts of such third persons are invasions of the legal right of the trustee in the trust *res* unaccompanied by any breach of trust or failure to perform the trust duty by the trustee; nor does it afford an adequate explanation for the liability of third persons in many cases where there has been a breach of trust unaccompanied by any actual interference with the trust *res* by the third person.³¹ These results would seem to suggest that the true theory upon which equity imposes liability upon third persons with respect to the trust *res* is, that it imposes upon an indeterminate number of persons a duty of refraining from conduct which aids or makes more effective the failure of the trustee to perform the obligation of the trust to his *cestui*. That this is the basis of imposing liability on third persons with respects to equitable rights is still more apparent in the case of contracts specifically enforceable in equity. When the contract is to sell a specific *res*, the vendee may claim the property from third persons except innocent purchasers. In the same manner, the holder of an option to purchase may claim the property from one not an innocent purchaser for value who acquired the property from the option vendor before

²⁹See 1 Ames, cases on Trusts 282, 285.

³⁰Professor Austin Wakeman Scott in 17 Columbia Law Rev. 269; cf. 17 Columbia Law Rev. 467.

³¹17 Columbia Law Rev. 467.

the exercise of the option.³² Here obviously the option vendee had no equitable property in the *res*. Yet the inequity of permitting a third person with notice, or who had parted with no value, to deprive the vendee of the benefit acquired by his contract is obviously the basis of the decisions. This was the basis of the decision in *Manchester Ship Canal Co. v. Manchester Racecourse Co.*,^{32a} where the court restrained a third person from purchasing property of the defendant who had contracted to give the plaintiff the "first right of purchase", although the court recognized that the plaintiff had acquired no "property right". Indeed, when the court of equity has jurisdiction over the contract, the same principle governs the liability of third persons where there is no *res* which is the subject matter of the contract. Thus, in *Lumley v. Wagner*,³³ where the defendant had a contract to sing exclusively for the plaintiff, a theatrical manager, the court not only enjoined the defendant from singing for a rival manager, but enjoined the rival manager from engaging the defendant in breach of the plaintiff's contract. The law courts adopted a similar principle in *Lumley v. Guy*,³⁴ in allowing the plaintiff to recover, in an action on the case, damages sustained through defendant's maliciously inducing one to break his contract with the plaintiff. The exact limits of the doctrine of *Lumley v. Guy* still remain to be marked out, but what the law is doing in this and the cases following it is to work out a principle, almost universal in its application, that rights *in personam*, regardless of whether they relate to a specific *res* or not, will be given the character of rights *in rem*, and will thus be clothed with the protection of the law in so far as they are capable of being injured or interfered with by the acts of third persons.

In the case of the restrictive covenant, the covenantee is normally entitled to equitable relief against the covenantor. His right differs from the right of the vendee in matter of form rather than principle. The vendee has the equitable right to compel the vendor to do something with his property, namely, convey it to the vendee, whereas the covenantee has the right to call upon the cove-

³²*Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37; *Ross v. Parks* (1890) 93 Ala. 153, 8 So. 368; *Calanchini v. Branstetter* (1890) 84 Cal. 249, 24 Pac. 149; *Maughlin v. Perry* (1872) 35 Md. 352; *Coleman v. Applegarth* (1887) 68 Md. 21, 11 Atl. 284; *Page v. Martin* (1890) 46 N. J. Eq. 585, 20 Atl. 46; *Kerr v. Day* (1850) 14 Pa. 112; *Barrett v. McAllister* (1890) 33 W. Va. 738, 11 S. E. 220.

^{32a}*Supra*, footnote 32, overruling on this point *Heathcote v. North Staffordshire Ry.* (1850) 2 Mac. & G. 100. The court recognized that the principle of the decision was the same as in *Lumley v. Wagner* (1852) 1 De G. M. & G. *604.

³³*Supra*, footnote 32a.

³⁴(1853) 2 El. & Bl. 216.

nantor to refrain from using his property in a particular manner. The covenant, as a matter of interpretation, may mean only that the covenantor is personally bound to this course of conduct,³⁵ or it may mean that the undertaking is that the use of the land, whether by the covenantor or others, shall be permanently restricted in the manner indicated by the covenant. If the latter construction is the correct one, can equity, consistently with its settled doctrines, refuse to impose upon the subsequent taker of the land the duty of refraining from any act interfering with the enjoyment of the covenantee's equitable right acquired by his covenant? And this is precisely what equity does do in enforcing the restrictive covenant. While, as already indicated, a variety of reasons have been assigned in explanation of this result, the principle of decision which seems to conform most completely with the decisions in those other classes of cases in which equity protects a mere claim *in personam* against encroachment by third persons, and which seems most in harmony with moral standards, is that of the equitable duty of non-interference with the covenantee's equitable right upon his covenant.

This view seems to have found acceptance in a qualified way by several of the English judges, who have referred the doctrine of the burden of the covenant's running in equity to the doctrine of "notice",³⁶ and has been accepted without qualification by a number of American judges.^{36a}

³⁵*Wilson v. Hart* (1866) 1 Ch. App. Cas. 463. For a case where a covenant apparently was treated as permanent in character and therefore enforceable against a subsequent taker of the land, see *Lewis v. Gollner*, footnote 21.

³⁶"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." Knight Bruce, L. J., in *De Mattos v. Gibson* (1859) 4 De G. & J. 276, 282.

"This suit is not brought to enforce a covenant, but on the ground that the defendant, having purchased land with notice of restrictions as to its use, is not in a position to use it in violation of those restrictions;" Cotton, L. J., in *Fairclough v. Marshall* (1878) 4 Ex. D. 37, 48.

"* * * although he [the defendant] was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Courts of Chancery would not allow him to use the land in contravention of the covenants. This is a sound principle." Cotton, L. J., in *Hall v. Ewin*, *supra*, footnote 19, at p. 79.

^{36a}"A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the

This phrase, however, must not be taken as meaning actual notice of the covenant to the subsequent taker, but as referring to any situation which the court of equity regards as precluding the defense of purchase for value and thus placing the defendant in the same situation as though he had had notice, since the courts have consistently applied the doctrine of purchase for value to the doctrine of equitable servitudes, and will enforce the restrictive covenant against the heir or innocent donee. Conformable to principle, however, it may be doubted whether equity would impose any burden with respect to a restrictive covenant upon an innocent heir or donee because of any *bona fide* acts of his before actual or constructive notice of the covenant.³⁷

While it is now well settled that equity will enforce restrictive covenants against subsequent takers of the servient tenement, there is still some uncertainty whether it should likewise enforce affirmative covenants requiring affirmative acts to be done on the servient land. Assuming that the covenant is not one in its nature to be performed personally by the covenantor, affirmative covenants will run with the land at law in an appropriate case,³⁸ and at one time the English courts enforced affirmative covenants in equity against subsequent takers, not purchasers for value, pro-

agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." Bigelow, J., in *Whitney v. Union Ry.* (1858) 77 Mass. 359, 364.

"* * * there is nothing anomalous in holding that this agreement should be specifically enforced in equity against all taking lot A with notice of that agreement in favor of the owner of the land for the benefit of which the agreement was made. In such a case it may be said and is said that there is an equitable restriction on A in favor of B. But that is apt to be misleading. The so called equitable restriction results from the fact that equity will enforce the agreement against those taking with notice in favor of the then owner of the land to be benefited. Equity does not enforce the agreement because there is an equitable restriction." Loring, J., in *Bailey v. Agawam Nat'l. Bank* (1906) 190 Mass. 20, 23, 76 N. E. 449.

"It will be found upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land." Beaseley, C. J., in *Brewer v. Marshall* (1868) 19 N. J. Eq. 537, 543. See also *Andrews, C. J., in Phoenix Ins. Co. v. Continental Ins. Co.* (1882) 87 N. Y. 400, 408; *Hodge v. Sloan* (1887) 107 N. Y. 244, 17 N. E. 335.

³⁷See *Eastwood v. Lever* (1863) 4 DeG. J. & S. *114. The innocent donee of trust property who parts with it before notice is not liable to the *cestui*, *Bonesteel v. Bonesteel* (1872) 30 Wis. 516, and may repurchase the property from an innocent purchaser and hold free of the trust. *Mast & Co. v. Henry* (1884) 65 Iowa 193, 21 N. W. 559.

³⁸*Barnard v. Goodscall* (1612) Cro. Jac. 309; *Marsh v. Brace* (1615) Cro. Jac. 334; *Twynam v. Pickard* (1818) 2 Barn. & Ald. 105; see also *supra*, footnote 8.

vided the covenant was one affecting the use and enjoyment of a business or a dominant tenement.³⁹ In *Haywood v. Brunswick, etc., Building Society*⁴⁰ the court refused to compel specific performance of a covenant to do construction work upon covenantor's premises by a subsequent purchaser with notice from the covenantor, the court being of the opinion that the doctrine of *Tulk v. Moxhay* should be limited to restrictive covenants. Professor Ames was of the opinion that this result was justifiable on the grounds that the purchaser would not be unjustly enriched if equity did not compel performance of the covenant by him, and on the ground that in such a case the covenantee had a right to compensation against the covenantor.⁴¹ The observation already made with reference to the doctrine of unjust enrichment as applicable to restrictive covenants is equally applicable here. If the performance of the covenant were to be deemed obligatory upon the purchaser of the land, his failure to perform it, if sanctioned by the court, would result in his enrichment, since the land in his hands would clearly be more valuable than it would if an incident of its acquisition and retention were liability to expend money upon it. Whether or not, however, the enrichment is unjust must depend in each case upon the answer to the question whether performance of the covenant by the purchaser is obligatory. Nor is it strictly accurate to say that "precisely the same loss" would have fallen on the covenantee if the covenantor had kept the land, if it be assumed that equity would have compelled the covenantor to perform the covenant during the period in which he retained the land. The theory upon which the plaintiff gets equitable relief is that damages for

³⁹*Cooke v. Chilcott* (1876) 3 Ch. D. 694; *Morland v. Cook* (1868) L. R. 6 Eq. 252, 265; *Aspden v. Seddon* (1876) L. R. 1 Ex. D. 496.

⁴⁰(1881) 8 Q. B. D. 403. See also *London & S. W. Ry. v. Gomm, supra*, footnote 11, at p. 583; *Austerberry v. Corporation of Oldham, supra*, footnote 18; *Clegg v. Hands, supra*, footnote 27. *Hayward v. Brunswick, etc., Building Society* was followed in *Miller v. Clary* (1913) 210 N. Y. 127, 103 N. E. 1114.

⁴¹"Such purchaser, by refusing to build, does not retain for himself any *res* which ought to go to the promisee. His only benefit is the avoidance of a possibly unprofitable expenditure of money. Nor does this benefit to him imply an unjust pecuniary loss to the promisee. For the latter still has his right to compensation for the promisor's breach of contract. If the promisor is solvent, the promisee will lose nothing; and even if the promisor is insolvent, the promisee's loss, like that of the other creditors, is simply the consequence of misplaced confidence in the pecuniary ability of the common debtor. Moreover, it is precisely the same loss that would have befallen him if the promisor had kept the land. So long as this is true, there is obviously no reason why equity should impose upon the promisor's assignee the constructive duty of fulfilling the latter's promise, and thereby shift the loss from the promisee, who willingly took the risk of the promisor's solvency, to the assignee, who gave no credit." J. B. Ames, 17 *Harvard Law Rev.* 176.

Breach of the covenant are inadequate and that he is entitled to have the covenant itself specifically performed. This equitable right cannot be enforced against the covenantor, since he is out of possession and cannot build on the land. If therefore the plaintiff secures the enjoyment of his equitable right, he can only do it by a mandatory injunction directed against the purchaser, that the purchaser do the construction work or at least permit the covenantor to do it. It therefore seems difficult to distinguish between negative and affirmative covenants on any theory of unjust enrichment.

It has also been suggested that the reason for the distinction made by *Haywood v. Brunswick, etc., Building Society* between affirmative covenants and restrictive covenants is that the restrictive covenant is enforceable against third persons only in so far as it gives rise to an equitable property right; that such property rights are created by restrictive covenants but not created by affirmative covenants.⁴²

But equity does sometimes impose affirmative obligations on strangers to the obligation because of their inequitable conduct with respect to it. Thus, where at common law a creditor had assigned his claim upon a debt and the debtor with notice of the assignment had paid the assignor, a court of equity would compel the debtor to pay over again. The debtor held no property either for the creditor or his assignee, and payment of the debt extinguished it at law, but the payment by the debtor with notice of the right of the assignee constituted an equitable wrong against the assignee for which equity would compel the debtor to make reparation by paying the amount of the debt to the assignee.⁴³ So, a debtor who pays his creditor who is a fiduciary, after demand by the fiduciary's principal, may be compelled to pay the debt a second time.⁴⁴ Strangers to a trust who aid the trustee in committing a breach of trust, although they do not acquire the trust *res*, may be held to account to the *cestui que trust* for the amount of loss suffered by him by reason of the breach of trust. They do not acquire any property from the trustee nor does the *cestui* have a claim to any property in their hands. Their liability is founded on their inequitable conduct in aiding the trustee in depriving the *cestui* of the benefit of his rights against the trustee.⁴⁵

⁴²Professor Austin Wakeman Scott in 17 *Columbia Law Rev.* 281 n. 48, 285.

⁴³17 *Columbia Law Rev.* 485.

⁴⁴17 *Columbia Law Rev.* 486.

⁴⁵17 *Columbia Law Rev.* 486, 487.

The transferee of land held subject to a trust who takes with notice of the trust may be compelled to convey to the *cestui* with covenants of warranty.⁴⁶ So far as the *cestui* may be said to have an equitable right in the trust property that may be satisfied by a quit-claim deed of the property. The affirmative duty to warrant is not one arising from the mere acquisition of the trust property by the defendant, but arises from the tortious act of the defendant in interfering with the plaintiff's right *in personam* against the trustee.

There is, therefore, no equitable principal which would deny the jurisdiction of equity to impose affirmative obligations on the taker of property held subject to such an equitable obligation where equity would compel the covenantor to perform the obligation while the property is in his possession, since the acquisition of the property without performing the obligation would tend to deprive the covenantee of the benefit of his covenant. The real question, then, is how far should equity in its discretion compel the performance of affirmative acts requiring the supervision of the court. Equity frequently refuses to compel the performance of such acts by the covenantor or promisor, not for want of jurisdiction, but on grounds of expediency. And, obviously, wherever equity would not enforce performance of the covenant by the covenantor, it should not impose the burden of the covenant on subsequent takers of the property from the covenantor. Since, however, the court has jurisdiction even in such a case, justice could be done and the difficulty could be avoided by a decree which should direct that the defendant purchaser be restrained from interfering with the covenantee; that the covenantee be permitted to do the construction work on the purchaser's land; that in the meantime the bill be retained and the defendant or the covenantor, according to the equities of the case, be directed to pay to the plaintiff the fair cost of the construction. Such a result would be more consistent with sound principle than the result reached in *Haywood v. Brunswick, etc., Building Society*, which would seem to be justified, if at all, upon grounds of expediency.

If the view here expressed, that the burden of the restrictive covenant is imposed on third persons in order to avoid depriving the covenantee of the benefit of his equitable rights upon his contract, is sound, it would follow: (a) that the liability of the third person will depend not upon his acquiring the property right or interest

⁴⁶17 Columbia Law Rev. 490 n. 61.

of the covenantor, but on the nature of his act or threat as tending to interfere with or defeat the equitable rights of the covenantee; (b) that the doctrine is equally applicable to agreements affecting personal property; (c) that the doctrine is applicable to contracts where no property right is to be acquired by the promisee other than the property right in the contract itself, provided the contract is one which equity will enforce between promisor and promisee; (d) that the application of the doctrine should be limited only by the exercise of the discretionary powers of courts of equity with respect to sound public policy and not by analogy to common law easements or other property rights.

(a) Reference has already been made to the fact that the English courts have refused to impose upon the contract purchaser of a leasehold as "equitable owner" the burdens of the covenants in the lease before actual assignment of the lease to him.⁴⁷ On the other hand, they have held that the mere occupant of the land, with respect to which a previous possessor has entered into a restrictive covenant, will be restrained from violating the terms of the covenant,⁴⁸ and in *In re Nisbet & Pott's Contract*⁴⁹ it was held that the burden of the covenant would run against a disseisor. The distinction between the two classes of cases seems clearly to be the one already indicated, *viz.*, that the defendant's threatened act in the case of the occupier or disseisor is one which would tend to deprive the covenantee of the benefit of the equitable right on his contract, whereas the act of the contract purchaser of the leasehold although it makes him "equitable owner" of the leasehold does not in itself have that effect. The decision in *In re Nisbet & Pott's Contract* has been supposed to established the character of the restrictive covenant as creating an equitable property right in the land itself in the nature of an equitable easement which would follow the land into the hands of a disseisor just as is the case with an easement at common law, and this, it is urged, is inconsistent with, and a real advance beyond, the rule that a disseisor of the trust *res* is not bound by the trust.⁵⁰ It is believed that the decision in *In re Nisbet & Pott's Contract* is one which

⁴⁷See *supra*, footnote 25. This is equally true if he goes into possession of the premises, but does not interfere with the performance of the covenant. *Purchase v. Lichfield Brewery Co.*, *supra*, footnote 24.

⁴⁸*Mander v. Falcke* [1891] 2 Ch. 554.

⁴⁹*Supra*, footnote 4.

⁵⁰17 Columbia Law Rev. 285.

emphasizes the character of the equitable right as a right *in personam* against an equitable obligee which gives rise to rights against third persons only so far as the acts of third persons tend to interfere with the enjoyment of the right *in personam* of the equitable claimant. The duty of the trustee is to hold the legal interest in the trust *res*, that is, to exercise his legal rights in it for the benefit of the *cestui que trust*. There is no breach of this duty to the *cestui* and no interference with the equitable rights of the *cestui* when a third person trespasses upon the trust *res* or disseises the trustee, and consequently equity gave no rights to the *cestui que trust* with respect to a mere trespass or disseisin. In the case of restrictive covenants which, in equity, affect subsequent takers of the land, the obligation of the covenantor is absolute in character, since it is contractual and relates exclusively to the physical user of the land, and not to the covenantee's legal interest in it as does the obligation of the trustee.

The covenant is that the land shall or shall not be used in a particular way. The *cestui que trust* by the creation of the trust acquires no right against the trustee not to have the land trespassed upon or disseised. The covenantee does acquire a right against his covenantor not to have the land built upon or used in a particular way, and that right may be defeated quite as effectually by the act of a trespasser or disseisor as by an act of the covenantor himself.⁵¹ Conceivably, upon a different principle equity might have given to the *cestui que trust* rights against the disseisor but that it did not do so, while giving rights on the restrictive covenant against the purchaser or disseisor leads inevitably to the conclusion that the right which it has protected from interference is the right *in personam* against the covenantor rather than an equitable property right in the land held subject to the restrictive covenant.

⁵¹That the covenantor may remain bound at law after he has transferred his land is clear, both on principle and authority, *Paethorpe v. Home Brewery Co., Ltd.* [1906] 2 K. B. 5, and although it has been held in certain cases that the covenantor was not bound after transferring his interest, this is clearly a matter of interpretation. *Toleman v. Portbury* (1870) L. R. 5 Q. B. 288; *Wilson v. Twamley* [1904] 2 K. B. 99. In equity, however, no relief by way of specific performance could be had against the covenantor since he is out of possession, unless he was doing some act in aiding the possessor in interfering with plaintiff's enjoyment of his equitable right. *Clements v. Welles* (1865) L. R. 1 Eq. 200; *Feilden v. Slater* (1869) L. R. 7 Eq. 523. The liability of the transferee in equity does not depend upon continued liability of the covenantor, but on his act in acquiring the property from the covenantor who was subject to the covenantee's equitable rights.

(b) If the burden of the restrictive covenant is made to run in order to protect adequately the right of the covenantee upon his contract, it would follow that the doctrine would be equally applicable to personal property where the contract is one which would be specifically enforced between the covenantor and the covenantee. If, however, the basis of the decisions is the doctrine of "equitable easement", it would follow that the doctrine could have no application to chattels since there is no law of easements or of dominant and servient tenement with respect to chattels.

This was the conclusion reached in *De Mattos v. Gibson*,⁵² by Vice-Chancellor Knight Bruce, who was of the opinion that every consideration which would lead equity to restrain third persons from violating the restrictive covenant affecting land would require a similar result in the case of chattels. Certainly the injury suffered by the plaintiff would be as great and the moral quality of the defendant's act in acquiring the chattel and repudiating the covenant would be the same as in the case of land. "Reason and policy seem to prescribe that * * * the acquirer shall not, to the material damage of a third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."⁵³

The doctrine of *De Mattos v. Gibson* was applied in *Catt v. Tourle*⁵⁴ and *Luker v. Dennis*.⁵⁵ Doubt, however, has been thrown upon these authorities by later cases,⁵⁶ and the English courts have refused to enforce restrictions on the price at which chattels may be resold on the ground that the doctrine of restrictive covenants does not apply to chattels.⁵⁷ In the United States we have reached the same result on the ground that such price restrictions were

⁵²*Supra*, footnote 36.

⁵³Knight Bruce, L. J., in *De Mattos v. Gibson*, *supra*, footnote 36, at p. 282.

⁵⁴(1869) 4 Ch. App. Cas. *654.

⁵⁵(1877) 7 Ch. D. 227.

⁵⁶See *Formby v. Barker*, *supra*, footnote 14; *London County Council v. Allen*, *supra*, footnote 14.

⁵⁷A contract against reselling at less than a specified price was held valid as between the parties to it, *Elliman, Sons & Co. v. Carrington & Son, Ltd.* [1901] 2 Ch. 275, and it would furnish the basis for equitable relief in a proper case. But a buyer with notice from promisor was held not liable in *Taddy & Co. v. Sterious & Co.* [1904] 1 Ch. 354; *McGruther v. Pitcher* [1904] 2 Ch. 306. With reference to the right of a patentee to restrict the use of patented articles see *Werderman v. Société Générale D'Electricité* (1881) 19 Ch. D. 246. As to the effect of restrictive agreements respecting patented articles see an article by Professor Thomas R. Powell in 17 *Columbia Law Rev.* 663. See also 10 *Harvard Law Rev.* 1.

illegal restraints of trade.⁵⁸ On the other hand, where a third person actually induced the purchaser to resell plaintiff's goods at less than the stipulated price, the English courts⁵⁹ have granted an injunction against the third person on the doctrine of *Lumley v. Guy*. They have also enforced a covenant against reselling news gathered and sold by the plaintiff, the injunction extending to third persons who contracted with the purchaser in violation of his agreement.^{59a} The English courts have enforced the brewers "tied house" covenants in favor of the successor to a business,⁶⁰ and in one case at least,⁶¹ they have imposed the burden of a restrictive covenant on a business in the hands of a purchaser who acquired the business subsequent to the execution of the covenant. The doctrine of the equitable mortgage by agreement, fully accepted in England and in most of the United States, and the doctrine of the equitable mortgage by pledge of title deeds, well settled in England and followed to a limited extent in the United States, is referable to the like doctrine of specific performance enforceable against all takers of the *res* with notice. These cases all exhibit the necessity of some adequate theory for protecting the equitable rights of a promisee when the promise relates to personal property, from infringement by the acts of third persons. The tendency in the United States has been to apply the doctrine of restrictive agreements to personal property when not regarded as an unlawful restraint of trade or in violation of public policy. And where the question has arisen it has been generally held that the restrictive covenant affecting chattels will be enforced against all but innocent purchasers where legal damages are inadequate,⁶² a result which seems entirely consistent with principle.

(c) Reference has already been made to the fact that the right *in personam* on a contract gives rise to a right *in rem* with respect

⁵⁸*Dr. Miles Medical Co. v. Park & Sons Co.* (1911) 220 U. S. 373, 31 Sup. Ct. 376. See also *Garst v. Hall & Lyon Co.* (1901) 179 Mass. 588, 61 N. E. 219, in accordance with the English authorities.

⁵⁹*National Phonograph Co., Ltd., v. Edison-Bell Consol. Phonograph Co., Ltd.* [1908] 1 Ch. 335.

^{59a}*Exchange Tel. Co., Ltd. v. Central News, Ltd.* [1897] 2 Ch. 48; *cf. Exchange Tel. Co., Ltd. v. Gregory* [1896] 1 Q. B. 147.

⁶⁰*Luker v. Dennis*, *supra*, footnote 55; *Catt v. Tourle*, *supra*, footnote 54; *Osborne v. Bradley* [1903] 2 Ch. 446; *Rice v. Noakes & Co.* [1900] 1 Ch. 213; *cf. Noakes & Co. v. Rice* [1902] A. C. 24, 35; *John Brothers, etc., Co. v. Holmes*, *supra*, footnote 20; *cf. Francisco v. Smith* (1894) 143 N. Y. 488, 38 N. E. 980.

⁶¹*Wilkes v. Spooner* (1910) 27 T. L. R. 157.

⁶²*Murphy v. Christian Press, etc., Co.* (1899) 38 App. Div. 426, 56 N. Y. Supp. 597; *New York Bank Note Co. v. Hamilton Bank Note*

to others than the promisor, so that it is an actionable wrong for a third person, knowingly, to induce the promisor to break his contract.⁶³ Where legal damages for such an injury are inadequate equity should restrain its commission. In *Lumley v. Wagner* where A had agreed to serve B exclusively and not to serve anyone else, it was held that equity would not only restrain A from singing for a third person but would restrain the third person from employing A in violation of her contract with the plaintiff. Obviously, the only property right to be protected here is the property right of the plaintiff in the contract itself, and if the contract is one which equity should specifically perform against the promisor, equity should not hesitate to restrain third persons from any act which would prevent the plaintiff from receiving the benefit of performance of his contract. May this doctrine be applied where the particular right stipulated for relates to property which, if secured by specific performance, is neither a common law property right nor analogous to one? If, for example, A contracts to convey an easement of way to B and the contract were specifically performed, B would acquire a property right in the land. Hence, applying the formula that equity regards as done what ought to be done, those who support the equitable property theory contend that the covenantee is equitable owner of the easement of way in A's land, and that subsequent takers of the land, not purchasers in good faith, are affected by plaintiff's equitable rights in the same way that they would be affected by legal ownership of a right of way, and that this is the real explanation of the running of the burden of restrictive covenants in equity.⁶⁴ From this it ought to follow that if the particular right or privilege stipulated for were something less than a property right, equity ought not to impose the burden of the covenant on subsequent takers of the servient tenement since there is no property right involved.

Reference has already been made to the fact that equity enforces option agreements against all who acquire land of the option vendor who were not purchasers for value, even though the purchase is effected before the exercise of the option.⁶⁵ In such cases the

Co. (1898) 28 App. Div. 411, 50 N. Y. Supp. 1093; *Standard American Pub. Co. v. Methodist Book Concern* (1898) 33 App. Div. 409, 54 N. Y. Supp. 55; *Littlefield v. Perry* (1874) 88 U. S. 205; *cf. Clark v. Flint* (1839) 39 Mass. 231.

⁶³See *supra*, footnote 34.

⁶⁴17 Columbia Law Rev. 281, 285.

⁶⁵See *supra*, footnote 32.

only property right involved before the exercise of the option is the plaintiff's property in the contract itself. Legal damages being inadequate, equity protects the right not only as against the promisor, but as against third persons who are unable to clothe themselves with the defense of purchase for value.

Notwithstanding these decisions which seem sound on principle, courts have experienced not a little difficulty in dealing with restrictive agreements which give to a plaintiff rights which are, in effect, contract rights to an easement in gross or to a common law license. The easement in gross, although conferring on the grantee rights in the grantor's land which cannot be revoked at law as between the grantor and grantee, is thus something more than a license. But at common law it is a more tenuous and uncertain right than an easement, since in most jurisdictions it could not be assigned⁶⁶ and in many it does not burden the land at law as against subsequent takers of the servient tenement.⁶⁷ In such a jurisdiction a restrictive covenant reserved in favor of one who had retained no land would create a mere equitable right analogous to an easement in gross, and if the analogy to the common law of property were followed equity would not impose the burden of the restrictive agreement on subsequent takers of the land. This was the holding in *Formby v. Barker*,⁶⁸ followed in *London County Council v. Allen*.⁶⁹ In the latter case the governing body of the City of London, wishing to keep a certain space in the city open and free from buildings, conveyed the *locus quo*, taking a restrictive covenant that the land should not be built upon. The grantee sold the land to the defendant who had notice of the covenant. It was held that the London County Council as covenantee was not entitled to any equitable relief against the defendant on the ground that the kind of right

⁶⁶*Ackroyd v. Smith*, *supra*, footnote 3; *Garrison v. Rudd* (1858) 19 Ill. 558; *Louisville & Nashville R. R. v. Koelle* (1882) 104 Ill. 455; *Cadwalader v. Bailey* (1891) 17 R. I. 495, 23 Atl. 20; *Boatman v. Lasley* (1873) 23 Oh. St. 614; *Wagner v. Hanna* (1869), 38 Cal. 111; *Whaley v. Stevens* (1883) 21 S. C. 221 (not descendible); *contra*, *Goodrich v. Burbank* (1866) 94 Mass. 459; *Standard Oil Co. v. Buchi* (1907) 72 N. J. Eq. 492, 66 Atl. 427; *Mayor, etc., of N. Y. v. Law* (1891) 125 N. Y. 380, 26 N. E. 471 (*semble*).

⁶⁷*Hill v. Tupper*, *supra*, footnote 3 (*semble*); *Ackroyd v. Smith*, *supra*, footnote 3; *Wagner v. Hanna*, *supra*, footnote 66; *Boatman v. Lasley*, *supra*, footnote 66; *contra*, *Owen v. Field* (1869) 102 Mass. 70; *Borough Bill Posting Co. v. Levy* (1911) 144 App. Div. 784, 129 N. Y. Supp. 740 (*semble*). See 7 Columbia Law Rev. 536.

⁶⁸*Supra*, footnote 14.

⁶⁹*Supra*, footnote 14.

stipulated for was not a property right because there was no dominant tenement. That the plaintiff could have restrained the covenantor does not seem open to doubt, for the plaintiff had a substantial interest in maintaining an open space which would have rendered legal damages speculative and inadequate.⁷⁰ Had the plaintiff retained land in the neighborhood, however insignificant, it could have restrained the defendant. It is not to be wondered at that one of the judges writing the prevailing opinion regarded the decision based on such a narrow and technical distinction as "regrettable" and that he reluctantly acquiesced in the result because he regarded himself as concluded by authority of *Formby v. Barker* and cases following it. Admittedly, there was abundant earlier authority for the proposition that the running of the burden depended not upon the plaintiff's property right but upon "notice" to the defendant, but these had been swept away by *Formby v. Barker* and it was for a higher court to lay down a different rule.

The question seems to be an open one in most of the United States. The question was involved in *St. Stephen's Church v. Church of Transfiguration*⁷¹ which was decided on other grounds. The doctrine of *Formby v. Barker* was followed in *Los Angeles University v. Swarth*,⁷² and the opposite rule was applied in *Borough Bill Posting Co. v. Levy*⁷³ and in *Van Sant v. Rose*,⁷⁴ holding that a restrictive covenant burdened the land in the hands of the subsequent taker even where there was no dominant tenement.

And this, it is submitted, is the view which should prevail. There is no reason why equity, which has made a distinct advance over the rules of property recognizing that equitable rights *in personam* are themselves a species of property worthy of protection, should set limits upon the protection which it affords, by analogy to rules of property developed before Sir Edward Coke's time and which it has actually to some extent supplanted. If the plaintiff has an equitable right on his covenant, that is, one which equity will

⁷⁰*Prospect Park, etc., R. R. v. Coney Island, etc., R. R.* (1894) 144 N. Y. 152, 39 N. E. 17; *Joy v. St. Louis*, *supra*, footnote 28; cases cited in 1 Ames, *Cases on Equity Jurisdiction*, 86 n. 7; *Kelly v. Central Pac. Ry.* (1888) 74 Cal. 557, 16 Pac. 386.

⁷¹(1911) 201 N. Y. 1, 94 N. E. 191; *cf.* opinion in the court below (1909) 130 App. Div. 166, 114 N. Y. Supp. 623.

⁷²*Supra*, footnote 9.

⁷³*Supra*, footnote 67.

⁷⁴(1913) 260 Ill. 401, 103 N. E. 194; *Vansant v. Rose* (1912) 170 Ill. App. 572.

enforce by compelling the covenantor to perform; if the injury to plaintiff is equally great and the act of the defendant is equally unconscientious, as in the case where a specific performance would give the plaintiff a property right; then equity should not deny relief merely because the result of a specific performance does not fall within one of the categories of property recognized as such by the courts of common law.

In many cases where a covenantee retains no land there would be no appreciable damage to him by the breach of the covenant. If A, who owned no other land in the neighborhood, sold his land subject to a covenant that it be used for church purposes only, it could not be said that, under ordinary circumstances, A would suffer any appreciable damage by a breach of the covenant which would require the exercise of equitable jurisdiction. It is true that where there is a dominant tenement in land, the covenantee may enforce the covenant regardless of the amount of damages,⁷⁵ for the performance of the covenant actually affects the use of the plaintiff's land, and confers upon him a right with respect to it which in legal contemplation is unique, and for the loss of which legal damages would be inadequate. But where the plaintiff's right is a reversion in the dominant tenement, he must show actual damage in order to invoke equitable relief upon the covenant against the tenant or possessor,⁷⁶ and it would seem that the covenantee who does not possess any dominant estate whatever would be in like situation.⁷⁷ Where, as in some jurisdictions, negative easements are enforced in equity regardless of the nature or amount of the damage,⁷⁸ it would follow that the restrictive covenant in gross would burden the land in the hands of a subsequent taker not an innocent purchaser. Such appears to be the rule in Illinois, where it is established that negative covenants may be enforced in equity merely because they are negative,⁷⁹ and, consequently, it is held that the restrictive covenant in gross burdens the land in the hands of an innocent purchaser.⁸⁰

⁷⁵Lord Manners v. Johnson (1875) 1 Ch. D. 673; 1 Ames, Cases on Equity Jurisdiction, 131 n. 4.

⁷⁶Johnstone v. Hall (1856) 2 K. & J. 414.

⁷⁷Formby v. Barker, *supra*, footnote 14, may be explained on this ground, for in distinguishing this case from De Mattos v. Gibson, *supra*, footnote 36, the court said at p. 553, "* * * it is plain the learned judge would not have thought an injunction ought to have been granted * * * unless the plaintiff had sustained material damage."

⁷⁸5 Columbia Law Rev. 153; Professor Langdell in 1 Harvard Law Rev. 383.

⁷⁹Andrews v. Kingsbury (1904) 212 Ill. 97, 72 N. E. 11.

⁸⁰Van Sant v. Rose, *supra*, footnote 74.

Where a covenantee must show inadequacy of legal remedy to entitle him to equitable relief *Formby v. Barker* should be followed, but there may be such inadequacy where the plaintiff had retained no land when the covenant affected the plaintiff's business as in the "tied house" covenant or the billboard license.⁸¹ *London County Council v. Allen* was a clear case of inadequacy of legal remedy which should entitle the covenantee to equitable relief. The public interest of the plaintiff in having the contract performed was sufficient to establish the inadequacy of legal remedy entitling the plaintiff to his equitable relief.⁸²

Where A consents that B shall do something on A's land the consent operates to defeat any claim which A might otherwise have for B's trespass through the plea of leave and license. The license confers upon the licensor no property right in the land, or right which, if enforced, would be analogous to a property right. This is true even where the license is promissory in character and given for good consideration.⁸³ It follows that if the license is revoked any subsequent exercise of the license privilege by the licensee is a trespass actionable as such, which may be repelled by necessary force, although the revocation may be a breach of contract for which the licensor must respond in legal damages.⁸⁴ These consequences do not result from any rule of law peculiar to the law of license but follow logically from the rule that the license does not create or convey any legal interest in the land, and that the sole effect of the license in the event of its breach is to give rise to a right to recover damages for breach of contract. There are, of course, certain types of licenses which have been deemed irrevocable upon grounds of policy, such as the license obtained by the pas-

⁸¹*Willoughby v. Lawrence* (1886) 116 Ill. 11, 4 N. E. 356; *Borough Bill Posting Co. v. Levy*, *supra*, footnote 67; *Goldman v. New York Advertising Co.* (1899) 29 Misc. 133, 60 N. Y. Supp. 275.

⁸²See *supra*, footnote 70.

⁸³*Wood v. Leadbitter* (1845) 13 M. & W. *838; *Marrone v. Washington Jockey Club* (1913) 227 U. S. 633, 33 Sup. Ct. 401; *Shubert v. Nixon Co.* (1912) 83 N. J. L. 101, 83 Atl. 369; *Horney v. Nixon* (1905) 213 Pa. 20, 61 Atl. 1088; *Boswell v. Barnum & Bailey* (1916) 135 Tenn. 35, 185 S. W. 692; see *Wiseman v. Lucksinger* (1881) 84 N. Y. 31; *Fletcher v. Livingston* (1891) 153 Mass. 388, 26 N. E. 1001; see also 13 Michigan Law Rev. 401; 17 Columbia Law Rev. 546.

⁸⁴*Kerrison v. Smith* [1897] 2 Q. B. 445; *Johnson v. Wilkinson* (1885) 139 Mass. 3, 29 N. E. 62; *cf. McCrea v. Marsh* (1858) 78 Mass. 211; *People ex rel. Burnham v. Flynn* (1907) 189 N. Y. 180, 82 N. E. 169; *Walsh v. Hyde & Behman Amusement Co.* (1906) 113 App. Div. 42, 98 N. Y. Supp. 960; *Taylor v. Cohn* (1906) 47 Ore. 538, 84 Pac. 388; *Weber-Stair Co. v. Fisher* (Ky. 1909) 119 S. W. 195; and see cases in footnote 70 (*semble*).

senger from a common carrier,⁸⁵ or by a guest at an inn,⁸⁶ and to a limited extent the license coupled with an interest,⁸⁷ the interest being any kind of property right, the enjoyment of which cannot be exercised without the exercise of the license. In each of these cases, although the license is not property, a revocation of it is not permitted at law in the case of the carrier and the innkeeper, since it would amount to the repudiation of a public duty imposed upon them, and in the case of the license coupled with an interest it would authorize the forcible deprivation of the licensee of enjoyment of his property in the so-called "interest". The effect of the legal rule as to the revocability of licenses except in these cases is to deny the licensee the right of self-help in order to secure the enjoyment of his right of contract, and the explanation of the doctrine that a license coupled with an interest is irrevocable seems to be that the law deems the license irrevocable since the recognition of the power to revoke would amount to a denial of the licensee's right to self-help with respect to his property.

Should equity enjoin the breach of a contract for a license where legal damages are inadequate, or should it refuse relief because the law regards the license as revocable when it is merely a contract right not connected with any other legal right or interest in the licensee? Whatever view may be taken of the assumption sometimes made that there is a legal right to break a contract, and to substitute for the performance of the contract the payment of damages, this doctrine is not one which has found acceptance by courts of equity where the legal damages are inadequate. The fact that the right stipulated for by the contract of license is one revocable at law because it is only a contract should be no answer to a bill for specific performance where the legal damages for the breach of contract are inadequate. To hold otherwise would lead to the absurdity that a contract by A to grant to B an easement of way for 20 years would be specifically enforceable, whereas a contract to permit B to maintain a drain over A's land for 20 years would give rise to no rights in equity. Even in the former case, the right is a right analogous to a common law property right and the latter is a mere license.⁸⁸ Moreover, the policy of the rule that

⁸⁵*Butler v. Manchester, etc., Ry.* (1888) 21 Q. B. D. 207.

⁸⁶*De Wolf v. Ford* (1908) 193 N. Y. 397, 86 N. E. 1173.

⁸⁷*Wood v. Manley* (1839) 11 Ad. & E. 34; *Cornish v. Stubbs* (1870) L. R. 5 C. P. *334; *Mellor v. Watkins* (1874) 9 Q. B. 400; *cf. Williams v. Morris* (1841) 8 M. & W. *488; *Hetfield v. Baum* (1852) 35 N. C. 394.

⁸⁸See *Wiseman v. Lucksinger, supra*, footnote 83. Here equitable relief was denied to one who had contracted with the licensor for the privilege

the license is revocable at law in order to avoid conferring upon the licensee the right of self-help has no application in equity where the right is determined and protected by injunction. That equity should give relief was early recognized in *Frogley v. Lovelace*,⁸⁹ where Wood, Vice-Chancellor, enjoined a landowner from revoking his contract to permit the plaintiff to sport over the defendant's land, and upon similar principles relief was given in *Duke of Devonshire v. Eglin*,⁹⁰ where the court enjoined the revocation of a license given for good consideration to permit the plaintiff to carry water in the conduits across the defendant's land.

The doctrine which obtains in some jurisdictions, that an oral license acted upon is irrevocable at law, is an application of the equity doctrine that a donor who has made an oral gift of land not actually carried out will be restrained from interfering with the donee who has gone into possession and has expended money or otherwise changed his position in reliance upon the gift.⁹¹ Only in this way can equity relieve from the loss which would be suffered by the donee because of his reliance upon the donor's promise if the donor were allowed to annul his legal rights as owner of the fee. Courts of equity will issue an injunction restraining the revocation of the license, where the licensee has acted on a parol license with an expenditure of money or labor,⁹² and in many jurisdictions law courts have taken over this doctrine and treat the license as irrevocable.⁹³ Obviously unless so treated by the law courts the licensee is remediless, since there is no contract entitling him to damages for its breach. Where, however, the license has not been acted upon

of constructing a drain across the licensor's premises, on the ground that the license by its terms was only at the pleasure of the licensor.

⁸⁹(1859) Johns. 333.

⁹⁰(1851) 14 Beav. 530. See also *James Jones & Sons, Ltd. v. Tankerville* [1909] 2 Ch. 440, where plaintiff enjoined defendant from revoking a license permitting plaintiff to cut wood on defendant's land.

⁹¹*Welch v. Whelpley* (1886) 62 Mich. 15, 28 N. W. 905; *Young v. Overbaugh* (1895) 145 N. Y. 158, 39 N. E. 712; *Messiah Home for Children v. Rogers* (1914) 212 N. Y. 315, 106 N. E. 59; and see cases collected in 1 Ames, *Cases on Equity Jurisdiction*, 307 n. 4, 309 n. 11.

⁹²*Duke of Devonshire v. Eglin*, *supra*, footnote 90; *Rerick v. Kern* (Pa. 1826) 14 S. & R. 267; *Southwestern R. R. v. Mitchell* (1882) 69 Ga. 114; *Western Union Tel. Co. v. Georgia R. & B. Co.* (D. C. 1915) 227 Fed. 276; *Shaw v. Proffitt* (1910) 57 Ore. 192, 109 Pac. 584, 110 Pac. 1092; *Metcalf v. Hart* (1891) 3 Wyo. 514, 27 Pac. 900; see 9 Illinois Law Rev. 281; *contra*, *Morse v. Lorenz* (1914) 262 Ill. 115, 104 N. E. 237; *cf.* *Finch v. Theiss* (1915) 267 Ill. 65, 107 N. E. 898; *Baynard v. Every Evening Printing Co.* (1910) 9 Del. Ch. 127, 77 Atl. 885.

⁹³*Minneapolis Mill Co. v. Minneapolis & St. L. Ry.* (1892) 51 Minn. 304, 53 N. W. 639; *Rerick v. Kern*, *supra*, footnote 92; *Dark v. Johnston* (1867)

and rests exclusively upon contract for which the licensee has given consideration, his only remedy at law is for legal damages for the breach of his contract.

In *Wood v. Leadbitter*⁹⁴ the plaintiff, who had purchased a ticket entitling him to visit a race-course maintained by the defendant, brought an action for assault for excluding him, the plaintiff, from the premises in violation of the contract of license. The court held that the defendant was not liable for the assault, since the license is revocable at law, and this case has been generally followed both in England and the United States. But in *Hurst v. Picture Theatres, Ltd.*,⁹⁵ upon a similar state of facts, it was held that the proprietor of the theater was liable for assault for forcibly removing the ticket-holder from the theater although using no more force than was necessary. The Court of Appeal, in reaching this conclusion, recognized the authority of *Wood v. Leadbitter* as determining the legal rule, but held that the equitable right of the plaintiff upon his contract was one that the court since the enactment of the Judicature Act was bound to recognize as irrevocable for all purposes, since it might have been enjoined by a court of equity. Whatever may be thought of the particular application of the rule in *Hurst v. Picture Theatres, Ltd.*, it is clear authority for the proposition, that, in a proper case where damages are inadequate, equity should exercise its jurisdiction to enjoin a breach of contract even though the only property or interest of the plaintiff is his interest in the contract itself.⁹⁶ While it is true that in most cases of specific performance the jurisdiction of the court is exercised in compelling performance of the defendant's promise to give something to the plaintiff, it is not infrequently exercised to compel the defendant to render a service to the plaintiff or to give to the plaintiff an exclusive privilege by enjoining the defendant from entering upon a course of conduct interfering with the privilege or otherwise injurious to the plaintiff although no prop-

55 Pa. 164; *Phillips v. Cutler* (1915) 89 Vt. 233, 95 Atl. 487; *United States v. Baltimore & Ohio R. R.* (D. C. 1875) 24 Fed. Cas. No. 14,510; *contra*, *St. Louis Nat'l. Stock Yards v. Wiggins Ferry Co.* (1885) 112 Ill. 384; *Crosdale v. Lanigan* (1892) 129 N. Y. 605, 29 N. E. 824; *White v. Manhattan Ry.* (1893) 139 N. Y. 19, 34 N. E. 887.

⁹⁴*Supra*, footnote 83.

⁹⁵[1915] 1 K. B. 1.

⁹⁶The decision in *Hurst v. Picture Theatres, Ltd.*, *supra*, footnote 95, has been criticised on the ground that the contract was not for a property interest. See 31 *Law Quarterly Rev.* 217; 13 *Michigan Law Rev.* 401.

erty right is involved.⁹⁷ The obligation of the contract coupled with the inadequacy of damage is sufficient to give the jurisdiction. All contracts of license fall clearly within the principle of the case when legal damages are inadequate and it is upon this principle that equity has not infrequently specifically enforced license contracts as between the parties to them.⁹⁸

If A by contract stipulates that B should have a license upon A's land, does such a contract give rise to rights against third persons with respect to the license either in law or equity, that is to say, will the license contract "burden the land" in the hands of subsequent takers not *bona fide* purchasers? Since at common law the license gave to B no right in the land, before *Lumley v. Guy* there was no legal theory upon the basis of which the licensee could recover against third persons for interference with his rights. But with the recognition in *Lumley v. Guy* that a contract is itself a right *in rem* as to third persons, there is a possibility at least that a license contract may receive such protection at law, and there is at least one case in which it has been held that one entitled to a license upon oral contract may, until the license is revoked, maintain an action on the case against a stranger for interfering with the rights acquired by the license. Thus, where a license was given by A to B to place drainage pipes across A's land it was held that B could maintain an action against C, a stranger, for tearing up the pipes although the court assumed that the license as between A and B was revocable by A.⁹⁹ Many questions of course arise in setting the precise limits to the legal remedy in cases of this kind, such as the correct measure of damages, whether the act of interference must be accompanied by malice or intention, and the like, but these questions cannot

⁹⁷*Exclusive right to defendant's services.* *Morris v. Colman* (1812) 18 Ves. Jr. *437; *Clarke v. Price* (1819) 2 Wils. Ch. 157; *Lumley v. Wagner*, *supra*, footnote 32; and cases cited in 1 Ames, Cases on Equity Jurisdiction 102 n. 3. *Exclusive trade discounts.* *Dietrichsen v. Cabburn* (1846) 2 Ph. 52. *Right of pre-emption.* *Manchester Ship Canal v. Manchester Race Course Co.*, *supra*, footnote 32. *Not to carry on a business in competition with plaintiff.* *Diamond Match Co. v. Roeber* (1887) 106 N. Y. 473, 13 N. E. 419; 1 Ames, Cases on Equity Jurisdiction 124 n. 3. *Exclusive agency.* *Singer, etc., Co. v. Union, etc., Co.* (C. C. 1873) 22 Fed. Cas. No. 12,904.

⁹⁸See *supra*, footnotes 89, 90, 91, and 92. *Snowden v. Wilas* (1862) 19 Ind. 10; *contra*, *Morse v. Lorenz*, *supra*, footnote 92; *Herndon v. Durham & Southern R. R.* (1913) 161 N. C. 650, 77 S. E. 683; *Jackson & Sharp Co. v. Philadelphia W. & B. R. R.* (1871) 4 Del. Ch. 180.

⁹⁹*Miller v. Township of Greenwich* (1898) 62 N. J. L. 771, 42 Atl. 735; *Miller v. Rambo* (1901) 66 N. J. L. 191, 49 Atl. 453; *Miller v. Rambo* (1906) 73 N. J. L. 726, 64 Atl. 1053.

arise where the relief sought is an equitable injunction since it does not attempt to give relief for past wrongs but merely seeks to restrain the defendant from future acts injurious to the plaintiff and it is therefore much simpler to give relief in equity in these cases. In *Borough Bill Posting Co. v. Levy*¹⁰⁰ the owner of real estate contracted with the plaintiff to give the plaintiff the exclusive privilege of maintaining a billboard on the defendant's land. Thereafter the defendant revoked the license and contracted to give the same privilege to a third person who threatened to interfere with the plaintiff's exercise of his license. The court restrained both the owner of the land and the defendant to whom he had given the second privilege from the threatened interference.

This result, it is believed, is sound in principle although the right acquired was not a right of property in the licensor's land. The court ruled that the contract referred to did not operate to give the plaintiff a lease, but suggested that the result might be sustained on the ground that the contract operated to give the plaintiff an easement in gross. This suggestion, however, does not aid the result reached unless it be recognized that equity will protect contracts which ought to be specifically performed as against the wrongful acts of third persons since the easement in gross was not a property right giving rise to rights against third persons.¹⁰¹ Once it is conceded that equity should enjoin the promisor from revoking his license, equitable principles require that like relief should be granted against third persons who interfere with the plaintiff's equitable right. The complications of modern social and business development are giving increased significance to contract rights, and if they can be protected only when they relate to some recognized form of property right, other than the contract involved, the opportunity for the commission of wrongs without adequate remedy will be greatly multiplied.

These considerations seem to have been given little weight in the recent case of *Sports, etc., Agency v. "Our Dogs" Pub. Co.*¹⁰² In this case, one Fall obtained by agreement with the Ladies Kennel Association "a sole photographic right in connection with" a dog show organized by the Association. Fall subsequently sold and transferred his rights to the plaintiff. The defendants, who had

¹⁰⁰*Supra*, footnote 67; see also *Willoughby v. Lawrence*, *supra*, footnote 81; *Baldock v. Atwood* (1891) 21 Ore. 73, 26 Pac. 1058; *Standard American Pub. Co. v. Methodist Book Concern*, *supra*, footnote 62.

¹⁰¹*Supra*, footnote 56.

¹⁰²[1916] 2 K. B. 880, *aff'd.* (Ct. of App.) 61 S. J. 299.

full notice of the contract with Fall, were allowed to take photographs which they threatened to publish. In an action for an injunction the court denied relief on the sole ground that the contract between the Ladies Kennel Association and Fall created no property right which a court of equity could protect. It did not appear whether the plaintiff's damage was such that legal damages for breach of contract would be inadequate or whether the plaintiff's privilege of photography included, as it probably did, the right to publish the photographs, and it is possible to support the result actually reached on these grounds.

But if it be assumed that legal damages would be inadequate, it would seem that Fall would have been entitled to specific performance of his contract, and unless his right be deemed purely personal in character, it could have been transferred to the plaintiff, and that third persons in the situation of the defendant, who by procuring the violation of the contract with the plaintiff interfered with the plaintiff's equitable right, should on that ground have been enjoined from committing any acts which would prevent the plaintiff's securing the fruits of his contract. This is substantially what the English courts do in the case of the "tiedhouse" covenants in which the covenantor contracts not to use beer on his premises except that brewed by the plaintiff covenantee. Subsequent takers of the land are deemed bound by the covenant because their action in taking the land and repudiating the covenant deprives the covenantee of the benefits of his contract. His damages are inadequate since his business is affected, the damage being too speculative to be measured by a common law jury. It has also been held that the covenantee might transfer the benefit of his covenant by transferring the business to which it was incident. It is difficult to distinguish the case on the principle from *Borough Bill Posting Co. v. Levy*¹⁰³ and *Willoughby v. Lawrence*¹⁰⁴ where the exclusive privilege was upheld and an injunction issued against the third person for interfering with it. To say that in one case only a license was granted whereas in the other an easement in gross was granted, even if the easement in gross be deemed a property right, is altogether too narrow a basis of distinction. The wrongs done by the defendant and the injury suffered by the plaintiff

¹⁰³ *Supra*, footnote 67.

¹⁰⁴ *Supra*, footnote 81. For other cases where equity has enforced a license against subsequent purchasers from the licensor, see *Thomas Cusack Co. v. Mann* (1911) 160 Ill. App. 649; *contra*, *Barbour v. Pierce* (1872) 42 Cal. 657.

were substantially alike in character in both cases and they afford a proper case for the protection of a court having equity powers.

(d) From the foregoing discussion it is evident that the running of the burden of contracts against third persons in equity should not, on principle, be limited by the analogies of common law property rights and should be controlled rather by those doctrines which guide the exercise of judicial discretion of courts of equity and which are usually referred to under the somewhat misleading head of "hardship." It is obvious that equity, in enforcing the burden of contracts on third persons, has departed from the rules of property because of their inadequacy and inapplicability to certain situations. It will deny its own possibility of future growth and adaptability to new situations if it arbitrarily sets a limit to their departure by analogies to the law of property as developed by the law courts. There is nevertheless a split of judicial authority with reference to this question. In a number of jurisdictions, the courts have refused to impose a burden on subsequent takers of the covenantor's land where the restriction was not similar to a common law easement which could be created by grant or reservation. This was notably the case in *Norcross v. James*,¹⁰⁵ where the restriction was against opening or maintaining a quarry on the covenantor's land which would compete with the plaintiff's quarry on adjoining land, the court holding that, by analogy to the common law easement, no restriction could be imposed on the servient tenement which did not look "to the direct physical advantage in the occupation in the dominant estate." In *Hodge v. Sloan*¹⁰⁶ the opposite result was reached upon a similar state of facts, the court saying

"I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. * * *

"Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in

¹⁰⁵*Supra*, footnote 28.

¹⁰⁶*Supra*, footnote 36^a.

a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity at least bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice, as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it."

And in *Brewer v. Marshall*¹⁰⁷ the court refused to follow the doctrine of *Norcross v. James*, but refused an injunction on the ground that the restriction upon the land was contrary to public policy, since it tended to restrain trade. The court, however, repudiated the doctrine that the application of the rule as to equitable burdens on the land should be limited by analogy to legal easements.¹⁰⁸ A legitimate limitation on the doctrine of the equitable burden, however, is the rule that such contracts will be strictly interpreted¹⁰⁹ and the rule that equity may in its discretion refuse relief where, owing to change of condition, enforcement of the restrictive covenant would be very burdensome to the defendant and of little benefit to the plaintiff.¹¹⁰ As, however, this is not jurisdictional the court may grant relief unless defendant will pay plaintiff the

¹⁰⁷ (1868) 19 N. J. Eq. 537.

¹⁰⁸ See, supporting *Hodge v. Sloan*, *supra*, footnote 106, cases cited in 1 Ames, Cases on Equity Jurisdiction 186 n. 1. See supporting *Norcross v. James*, *supra*, footnote 28, *Taylor v. Owen* (Ind. 1830) 2 Blackf. 301; *Kettle River R. R. v. Eastern Ry. of Minn.* (1889) 41 Minn. 461, 43 N. W. 469; *Tardy v. Creasy* (1886) 81 Va. 553; *American Strawboard Co. v. Halde-man Paper Co.* (C. C. A. 1897) 83 Fed. 619.

¹⁰⁹ *Ind. Coope, & Co., Ltd. v. Hamblin* (1900) 84 L. T. R. (N. S.) 168; *Duryea v. Mayor, etc.*, of N. Y. (1875) 62 N. Y. 593; *Blackman v. Striker* (1894) 142 N. Y. 555, 37 N. E. 484; *Minister, etc., of Reformed, etc., Church v. Madison Ave. Bldg. Co.* (1914) 163 App. Div. 359, 148 N. Y. Supp. 519, *aff'd.* (1915) 214 N. Y. 268, 108 N. E. 444; *Schoonmaker v. Heckscher* (1916) 171 App. Div. 148, 157 N. Y. Supp. 75; *Walker v. Renner* (1900) 60 N. J. Eq. 493, 46 Atl. 626; *Eckhart v. Irons* (1889) 128 Ill. 568, 20 N. E. 687; *Hutchinson v. Ulrich* (1893) 145 Ill. 336, 34 N. E. 556.

¹¹⁰ *Duke of Bedford v. Trustees of British Museum* (1822) 2 Myl. & K. 552; *Jackson v. Stevenson* (1892) 156 Mass. 496, 31 N. E. 691; *Trustees of Columbia College v. Thacher* (1882) 87 N. Y. 311; and cases cited in 1 Ames, Cases on Equity Jurisdiction 181 n. 9.

fair value of the restriction,¹¹¹ or it may even assess the value and direct the defendant to pay it instead of giving specific relief.¹¹² This power of the court to exercise its discretion in enforcing the restrictive covenant affords a much more flexible and adequate correction of the doctrine of equitable restrictions than it is possible to effect by the arbitrary adherence to the analogy to property interests in land.

[TO BE CONCLUDED.]

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¹¹¹*Amerman v. Deane* (1892) 132 N. Y. 355, 30 N. E. 741; *Rowland v. Miller* (1893) 139 N. Y. 93, 34 N. E. 765; *People ex rel. Frost v. New York Cent. & H. R. R. R.* (1901) 168 N. Y. 187, 61 N. E. 172; *McClure v. Leaycraft* (1905) 183 N. Y. 36, 75 N. E. 961.

¹¹²*Supra*, footnote 110. Since the giving of a modified or substituted relief or the refusal to give relief in these cases is discretionary and not a matter of right, it would follow that the owner of land subject to a covenant which equity would not enforce against him, would, nevertheless, have no standing in equity to maintain a bill to have the covenant cancelled. In New York the right has apparently been given by statute. Code, Civ. Proc. § 1638. See *St. Stephen's Church v. Church of Transfiguration*, *supra*, footnote 71.

THE EFFECT OF WAR ON CONTRACTS.

What effect does the outbreak of war between nations have upon contracts between citizens of such nations? Here is a question which merchants and manufacturers in most of the commercial centers of the world have been asking their legal advisers since the summer of 1914. It is also a question which will be asked many times in the future, and especially after the war, for with the return of peace the courts of the belligerent nations will be opened to litigants who are now barred from such courts as alien enemies.¹ It may be safely predicted that a majority of the numerous cases which will arise out of problems created by the war, will involve commercial contracts entered into by residents of the United States and residents of Germany or Austria.

A casual search through digests and the reading of case headnotes may leave the searcher with the vague impression that the outbreak of war has some peculiar effect upon contracts, not to be accounted for by any of the well established principles of contract law. Thus, it is frequently said that war suspends contracts and that the cessation of war revives the same.² On the other hand, it is stated elsewhere in no less positive terms that war dissolves and abrogates all contracts between subjects of belligerent nations.³ An attempt will here be made to show that cases arising upon contracts affected by war may in fact be classified by an application of the broad principles of the common law relating to contracts.

¹It is well settled that alien enemies, resident in the enemy country, may not sue in our courts during the war. *Brandon v. Nesbitt* (1794) 6 Durn. & E. 23; *Porter v. Freudenberg* [1915] 1 K. B. 857. In *Dorsey v. Thompson* (1872) 37 Md. 25, two theories are suggested as a basis for this rule: (1) that there is a possible benefit to be derived by the enemy from allowing such a plaintiff to recover, and (2) that there is no right in such plaintiff to use the courts, by reason of his status as an alien enemy. Trading with the Enemy Act (Act of Oct. 6, 1917) § 7b by implication recognizes this rule. But if the alien enemy resides in this country, this disability does not exist. *Clarke v. Morey* (N. Y. 1813) 10 Johns. 69; *Schaffenius v. Goldberg* [1916] 1 K. B. 284.

²*Prize Cases* (1862) 67 U. S. 635, at p. 687; *Semmes v. City Fire Ins. Co.* (1869) 21 Fed. Cas. No. 12,651; *Brown v. Hiatts* (1872) 82 U. S. 177; *Statham v. New York Life Ins. Co.* (1871) 45 Miss. 581; *Haymond v. Camden* (1883) 22 W. Va. 180; *O'Reily v. Mutual Life Ins. Co.* (N. Y., 1866) 2 Abb. Pr. (n. s.) 167; *Jackson Ins. Co. v. Stewart* (1866) 13 Fed. Cas. No. 7,152; *Janson v. Driefontein Consol. Mines, Ltd.* [1902] A. C. 484.

³*Brown v. Delano* (1815) 12 Mass. 370; *M'Grath & Jones v. Isaacs* (S. C. 1819) 1 Nott & McCord 562; *Hanger v. Abbott* (1868) 73 U. S. 532.

I.

Contracts made between subjects of belligerent nations after the outbreak of war are usually declared void.* "War, when duly declared or recognized as such by the war making power, imports a prohibition to subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country,"⁵ unless such intercourse is permitted by express license from the sovereign.⁶ This is universally declared to be a principle of "public law,"⁷ sanctioned by international custom and usage. The belligerent governments, however, upon the outbreak of war, are usually prompt in giving detailed expression to this rule of international law in the form of "non-intercourse acts,"⁸ or "trading with the enemy acts."⁹ All commercial intercourse between peoples at war being thus forbidden, contracts entered into subsequent to the war, without express license, are usually

*Willison v. Patteson (1817) 7 Taunt. 439; Buchanan v. Curry (N. Y. 1821) 19 Johns. 137; Mutual Benefit Life Ins. Co. v. Hillyard (1874) 37 N. J. L. 444; Scholefield v. Eichelberger (1833) 32 U. S. 586; Hanger v. Abbott, *supra*, footnote 3; Haggard v. Conkwright (1869) 70 Ky. 16; Haymond v. Camden, *supra*, footnote 2; Billgerry v. Brand (1869) 60 Va. 393; Musson v. Fales (1820) 16 Mass. *332; Griswold v. Waddington (N. Y. 1819) 16 Johns. *438; White v. Burnley (1857) 61 U. S. 235; The Prize Cases, *supra*, footnote 2; Russ v. Mitchell (1864) 11 Fla. 80; Jackson Ins. Co. v. Stewart, *supra*, footnote 2; Rice v. Shook (1871) 27 Ark. *137; Watts, Watts & Co. v. Unione Austriaca di Navigazione (D. C. 1915) 224 Fed. 188; Elgee's Adm'r. v. Lovell (1865) 8 Fed. Cas. No. 4,344.

⁵Hanger v. Abbott, *supra*, footnote 3, at p. 535. *Accord*, the Wm. Bagaley (1866) 12 U. S. 377, at p. 405; The Prize Cases, *supra*, footnote 2, at p. 687; Insurance Co. v. Davis (1877) 95 U. S. 425, at p. 432; Kershaw v. Kelsey (1868) 100 Mass. 561; Walker v. Beauchler (1876) 68 Va. 511; Haymond v. Camden, *supra*, footnote 2; Small v. Lumpkin (1877) 69 Va. 832; Harden v. Boyce (N. Y. 1870) 59 Barb. 425; The Hoop (1799) 1 C. Rob. 196; Potts v. Bell (1800) 8 Durn. & E. 548, at p. 561; The Panariellos (1915) 84 L. J. P. 140; Horlock v. Beal [1916] 1 A. C. 486; Robson v. Premier Oil Co. [1915] 2 Ch. 124, at p. 135; Arnold Karberg & Co. v. Blythe, etc. Co. [1915] 2 K. B. 379; 4 Calvo Le Droit International (4th ed.) § 1953, *et seq.*; 2 Halleck, International Law (4th ed.) 143, *et seq.*; 1 Trotter, The Law of Contract During War § 9.

⁶United States v. Lane (1868) 75 U. S. 185; Scholefield v. Eichelberger, *supra*, footnote 4; United States v. One Hundred Bbls. Cement (1862) 27 Fed. Cas. No. 15,945.

⁷Stephens v. Brown (1884) 24 W. Va. 234; Rice v. Shook, *supra*, footnote 4; McKee v. United States (1868) 75 U. S. 163; Hanger v. Abbott, *supra*, footnote 3; United States v. Lane, *supra*, footnote 6; Conrad v. Waples (1877) 96 U. S. 279; Haggard v. Conkwright, *supra*, footnote 4; Statham v. New York Life Ins. Co., *supra*, footnote 2.

⁸Cf. 13 Stat. 730-1.

⁹See British Trading with the Enemy Act, September 18, 1914, (Act 4 and 5 Geo. V, c. 87) and United States Trading with the Enemy Act (Act of Oct. 6, 1917.)

in sweeping terms declared void as contrary to public policy.¹⁰ Like all rules grounded on public policy, an absolute rule cannot be safely applied in every instance. In forbidding commercial intercourse with enemy subjects, the nation is particularly concerned that no money, commodities or intelligence pass into the enemy country, to aid and strengthen the opposing forces.¹¹ Hence it is that the international law ban upon all trading or commercial intercourse with enemy peoples falls not only upon trade or intercourse with subjects and citizens of the enemy residing in the enemy country, but upon trade or intercourse with every resident, or person having a "trade domicile" in enemy territory, regardless of such person's sympathies.¹² And accordingly, so long as there is no actual trafficking across the enemy's frontier and no transaction involving a transfer into enemy territory of money, goods or intelligence, it is probable that the strict rule making void all contracts between belligerents subsequent to the beginning of war, cannot be universally applied, aside from statutory prohibitions. This was the opinion of Justice Gray in the leading case of *Kershaw v. Kelsey*,¹³ decided in 1868, wherein

¹⁰*Supra*, footnote 4.

¹¹*Briggs v. United States* (1892) 143 U. S. 346, 12 Sup. Ct. 391; *Hepburn's Case* (Md. 1830) 3 Bland 95; *Buchanan v. Curry*, *supra*, footnote 4; *Statham v. New York Life Ins. Co.*, *supra*, footnote 2; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, *supra*, footnote 4; *Porter v. Freudenberg*, *supra*, footnote 1, at p. 868; *Dacey, Conflict of Laws* (2nd ed.) 737; *cf.* § 4a *United States Trading with the Enemy Act*.

¹²*Small v. Lumpkin*, *supra*, footnote 5; *The Pizarro* (1817) 15 U. S. 227, at p. 246; *Espósito v. Bowden* (1857) 7 El. & Bl. 763; *Porter v. Freudenberg*, *supra*, footnote 1; *McConnell v. Hector* (1802) 3 B. & P. 113; *Janson v. Driefontein Consol. Mines Ltd.*, *supra*, footnote 2, at p. 505; *Ingle, Ltd. v. Mannheim Ins. Co.* [1915] 1 K. B. 227; 2 *Westlake, International Law* 140; 2 *Oppenheim, International Law* (2nd ed.) §§ 88, 90.

¹³*Supra*, footnote 5.

The following is taken from the opinion in this case at pp. 572, 573:

"The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes * * * any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the textbooks are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed

it was held, after an elaborate review of American, English and continental authorities, that a lease of a cotton plantation in Mississippi, executed in February, 1864, between a resident of Mississippi, and a resident of Massachusetts, the latter sojourning for the time being in Mississippi, was valid, since this contract involved no dealings back and forth across the line between the belligerent nations, and contained no agreement for the shipment of cotton or other commodities across the line. To say, then, as high authority has said, that subsequent to a declaration of war

to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

This decision has received the express approval of the United States Supreme Court, (Mr. Justice Field in *Briggs v. United States*, *supra*, footnote 11, and *Williams v. Paine* (1897) 169 U. S. 55, 18 Sup. Ct. 279), but has been criticized in a recent English case, *Robson v. Premier Oil Co.*, *supra*, footnote 5. In this case it was held that an alien enemy holding shares in a British corporation, might not vote such shares during the war. It was urged that the prohibition of intercourse between subjects of belligerent nations extended only to commercial intercourse, and counsel cited *Kershaw v. Kelsey* to support this contention. The court, however, remarks:

"This case has been followed in other cases in America. As we have already said, no such limitation is to be found suggested in any English case, and we cannot agree with it. The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.

"The learned judge, Gray, J., in *Kershaw v. Kelsey*, states the law in our opinion correctly when he says the law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries, but we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse.

"We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or advantage to the enemy; it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the language of the learned judge before mentioned, inconsistent with the state of war between the two countries and therefore forbidden."

Similar to *Kershaw v. Kelsey* is *Haggard v. Conkwright*, *supra*, footnote 4, in which the facts were as follows: In September, 1861, H, in Kentucky drew and delivered to C in Kentucky (a loyal state) an order addressed to E in Texas (a rebel state) requesting him to pay money in his hands belonging to H to T, who was in Texas. This order was transmitted through the lines and executed. Held, that this transaction was valid. Cf. *Antoine v. Morshead* (1815) 6 Taunt. 237. *Contra*, *Billgerry v. Brand*, *supra*, footnote 4.

In *Briggs v. United States*, *supra*, footnote 11, a resident of Kentucky sold and delivered to another resident of Kentucky all the cotton on his plantations in Mississippi. This sale purported to include all cotton which the vendor had or might have during the year 1862. The cotton was seized by Union forces. The vendee, after the war, brought suit in the Court of Claims under the Abandoned Property Act to recover the proceeds of the cotton thus seized. Held, that the vendee might recover.

between nations the citizens of the one nation have "no capacity to contract" with the citizens of the other,¹⁴ is not to indicate accurately the reasons why such contracts are usually held void.¹⁵

Since the passage on October 6, 1917 of the Trading with the Enemy Act, discussion of the right of citizens of the United States to contract with citizens or subjects of enemy countries or the allies of enemy countries, requires a study of such act. It may be stated broadly, that it is now unlawful under this act for any person or corporation in the United States to "Enter into, carry on, complete, or perform any contract, agreement, or obligation * * *. Pay * * * compromise, or give security for the payment * * * of any debt * * *. Draw, accept, pay, * * * or indorse any negotiable instrument or chose in action * * *. Buy or sell, loan * * * trade in, deal with, exchange, * * * transfer, * * * or receive any form of property," or "have any form of business or commercial communication or intercourse with" (1) individuals or partnerships resident in territory of an enemy nation or the ally of an enemy nation, or with corporations incorporated in such territory, or (2) with individuals or partnerships resident outside the United States, or corporations incorporated outside the United States, which are doing business in such territory, or (3) with enemy governments or allies of the enemy governments, national or municipal, or their officers or agents, or (4) with individuals, other than citizens of the United States, who are natives, citizens, or subjects of an enemy nation or ally of an enemy nation, wherever resident or doing business, whom the President of the United States may by proclamation declare to be "enemies."¹⁶ An exception to this broad prohibition exists where a license has been obtained from the President within a prescribed period.¹⁷

¹⁴Mr. Justice Catron in *White v. Burnley* (1857) 61 U. S. 235 and Mr. Justice Johnson in *Scholefield v. Eichelberger*, *supra*, footnote 4.

¹⁵It was held by Lord Mansfield as early as 1765 that recovery would lie after the war upon a ransom bill executed to an enemy subject during hostilities. *Ricord v. Bettenham* (1765) 3 Burr. 1734.

In *Musson v. Fales* (1820) 16 Mass. 331, the facts were as follows: a United States brig put into Bermuda during the war of 1812, and by means of bogus ship's papers which gave her the appearance of being a Spanish vessel, prevailed upon certain British merchants at Bermuda to make repairs for her and advance certain funds. After the war, these British merchants were allowed to recover for these advances. It must be obvious that if capacity to contract were indeed lacking, these results could never be reached.

¹⁶§§ 2 and 3. Cf. § 7b.

¹⁷§§ 4a and 5.

II.

Of contracts entered into prior to the war, debts, or so-called executed contracts, are the least difficult of classification. When all active performance required by the terms of a contract has taken place prior to the outbreak of war and nothing remains but an obligation to pay money, resting upon one of the contracting parties, the authorities are uniform in holding that the obligee's right to collect this debt is not cut off by war, but merely suspended for the period of the war.¹⁸ While the courts do not deny that a nation at war has the right to confiscate debts owed by its citizens to the enemy,¹⁹ the exercise of this right, once favored by jurists,²⁰ would to-day doubtless be universally disapproved²¹—unless perhaps by international lawyers of the "scrap of paper" school. And if the state fails to avoid such debts, the courts universally declare that the debtors themselves may not, upon the return of peace, plead the war as a bar to their obligations. Even with this protection, however, the creditor will be concerned (1) as to the running of the statute of limitations, and (2) as to his right to recover interest for the period of the war. American owners of the bonds of German and Austrian corporations will examine with particular care the authorities on these questions.

¹⁸*Jackson Ins. Co. v. Stewart*, *supra*, footnote 2; *Brown v. Hiatts*, *supra*, footnote 2; *Hanger v. Abbott*, *supra*, footnote 3; *Perkins v. Rogers* (1871) 35 Ind. 124; *Hoare v. Allen* (1789) 2 U. S. 102; *New York Life Ins. Co. v. Statham* (1876) 93 U. S. 24; *Hamersley v. Lambert* (N. Y. 1817) 2 Johns. Ch. *508; *Mutual Benefit Life Ins. Co. v. Hillyard*, *supra*, footnote 4; *Rice v. O'Keefe* (1871) 53 Tenn. 638; *Wall v. Robson* (S. C. 1820) 2 Nott & McCord 497; *Wilcox v. Henry* (1782) 1 U. S. 69; *Brown v. United States* (1814) 12 U. S. 110; *Crutcher v. Hord* (1868) 67 Ky. 360; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, *supra*, footnote 4; *Rothbarth v. Herzfeld* (1917) 100 Misc. 470, 166 N. Y. Supp. 744.

¹⁹*Schulz Co. v. Raimés & Co.* (1917) 100 Misc. 697, 164 N. Y. Supp. 454; *Peerce v. Carskadon* (1870) 4 W. Va. 234.

²⁰See *Year Book*, 19 Edw. IV, pl. 6, holding that an alien's bond was forfeited by war. *Hanger v. Abbott*, *supra*, footnote 3; *Jackson Ins. Co. v. Stewart*, *supra*, footnote 2; *Schulz Co. v. Raimés & Co.*, *supra*, footnote 19.

²¹*Mutual Benefit Life Ins. Co. v. Hillyard*, *supra*, footnote 4; *Wall v. Robson*, *supra*, footnote 18; *Brown v. United States*, *supra*, footnote 18; *Hanger v. Abbott*, *supra*, footnote 3; *Wolff v. Oxholm* (1817) 6 M. & S. 92. Treaties have frequently by express terms forbidden sequestration and confiscation of debts. See *Treaty between United States and France* (1800); *Treaty between United States and England* (1795). Within recent years the old right of confiscation of debts has been exercised only once, namely, by the Confederate States in 1861. See *Act of Confederate Congress of August 30, 1861*, entitled "An Act for the Sequestration of the Estates of Alien Enemies," amended, Feb. 15, 1862.

The cases are apparently uniform in holding that the usual period prescribed by the Statute of Limitations is to be enlarged by including within itself the additional period of the war.²² Contrary to the usual rule relative to disabilities arising subsequent to the maturity of a debt,²³ this rule is applied even in cases where war commences subsequent to the maturity of the debt, the time during which the statute runs being computed by adding the period from the maturity of the debt to the outbreak of war, to the period from the end of the war to the commencement of the suit.²⁴ The theory of the courts is that since the courts of the debtor's country are closed to the creditor while the war lasts, on the ground that he is an alien enemy, to permit the statute to run against the debt pending such disability would be in substance to confiscate the debt.²⁵ Cases which permit the statute to run during the war period can usually be distinguished on the ground that in the particular case considered the creditor had free access to the courts of the debtor's domicile during the war.²⁶

As to the creditor's right to interest during the war period, the courts favor the debtor to an extent which cannot be approved, either in justice or as consistent with legal theory. The rule, announced and applied without qualification in nearly all the cases on the subject, is that interest upon a debt due from a resident in the enemy country, abates during the period of the war, and upon the return of peace may not be collected for such period.²⁷

²²*Perkins v. Rogers*, *supra*, footnote 18; *Hanger v. Abbott*, *supra*, footnote 3; *The Protector* (1871) 79 U. S. 700; *Brown v. Hiatts*, *supra*, footnote 2; *Caperton v. Martin* (1870) 4 W. Va. 138; *Hoare v. Allen*, *supra*, footnote 18; *Seymour v. Bailey* (1872) 66 Ill. 288; *Mixer v. Sibley* (1869) 53 Ill. 61; *Williams v. State* (1881) 37 Ark. 463. This rule does not appear to have been altered by the Trading with the Enemy Act. See § 8c.

²³Act 21 James I, c. 16 § 7; *Wood*, *Limitations* (3rd ed.) 526 *et seq.*; 25 Cyc. 1267.

²⁴*Jackson Ins. Co. v. Stewart*, *supra*, footnote 2; *Wall v. Robson*, *supra*, footnote 18.

²⁵*Williams v. State*, *supra*, footnote 22.

²⁶*Zacharie v. Godfrey* (1869) 50 Ill. 186.

²⁷*Hoare v. Allen*, *supra*, footnote 18; *Brown v. Hiatts*, *supra*, footnote 2; *Jackson Ins. Co. v. Stewart*, *supra*, footnote 2; *Mutual Benefit Life Ins. Co. v. Hillyard*, *supra*, footnote 4; *Shortridge v. Macon* (1867) 22 Fed. Cas. No. 12,812; *Foxcraft v. Nagle* (1791) 2 U. S. 132; *Roberts' Adm'r. v. Cocke* (1877) 69 Va. 207, 212; *McVeigh v. Bank of the Old Dominion* (1875) 76 Va. 188; *Chamberlain v. Brown* (Md. 1803) 2 Bland's Ch. 221; *Dickinson v. Legare* (S. C. 1797) 1 Desaussure 537; *Christie v. Hammond* (Md. 1795) 2 Bland's Ch. 645n; *Davis v. Wright* (1835) 2 S. C. 560, 568; *Blake v. Quash* (S. C. 1825) 3 McCord *340; *M'Call v. Turner* (1797) 5 Va. *133; *Brewer v. Hastie & Co.* (1801) 7 Va. *22; *Tucker v. Watson*, *McGill Co.* (Pa. 1867) 6 Am. Law Reg. (N. s.) 220; *Bordley v. Eden* (Md. 1793) 3 Harris & McHenry 167; *Bigler v. Waller* (1870) 3 Fed. Cas. No. 1,404.

The reasoning of the courts appears to be that since payment of the principal of the debt is unlawful during the war, the debtor must not be taxed for retaining such principal. Thus it is said in a leading case upon the point,²⁸

"Interest is paid for the *use or forbearance* of money. But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendant pay him, consistent with law; * * *. Where a person is prevented by law, from paying the principal, he shall not be compelled to pay interest during the prohibition, * * *."

So it has been frequently held that where the creditor has an agent residing during the war in the same country with the debtor, interest may be recovered for the war period.²⁹ Under the present Trading with the Enemy Act, providing³⁰ for an "alien property custodian," who is "empowered to receive all money and property in the United States due or belonging to an alien enemy, or ally of enemy," it would seem that an enemy creditor would always during the present war have an agent, resident in the United States, in the person of this official, authorized to accept payment, and that interest would not therefore abate during the war on such a debt.

Only two exceptions to this strict rule seem to have been suggested by the courts, and neither of these adopted or approved. In *Shortridge v. Macon*,³¹ decided in 1867, the court announced the doctrine that a Confederate debtor could not, as against a Northern creditor, assert that interest abated in his favor during the period of the Civil War, since to permit him to claim such an abatement on the ground that he could not have paid the principal of the debt during the war period would be to permit him to take advantage of his own wrong in adhering to the forces of secession. Although this rule of special privilege to Northern

²⁸*Hoare v. Allen*, *supra*, footnote 18. Practically the same language is used by the court in *Brown v. Hiatts*, *supra*, footnote 2.

²⁹*Ward v. Smith* (1868) 74 U. S. 447; *Denniston v. Imbrie* (1818) 7 Fed. Cas. No. 3,802; *Thomas v. Hunter* (1868) 29 Md. 406; *Yeaton v. Berney* (1871) 62 Ill. 61; *Kent, Paine & Co. v. Chapman* (1881) 18 W. Va. 485, 501; *Crenshaw v. Seigfried* (1874) 65 Va. 272; *Johnston v. Wilson* (1877) 70 Va. 379; *Hawkins' Ex'rs. v. Minor* (1804) 9 Va. 118; *Paul v. Christie* (Md. 1798) 4 Harris & McHenry 161; *Conn v. Penn* (1818) 6 Fed. Cas. No. 3,104.

³⁰§ 6.

³¹*Supra*, footnote 27.

creditors was approved in two subsequent decisions,³² a doubt as to its correctness was intimated in the case of *Bigler v. Waller*³³ by the same Federal judge who wrote the opinion in *Shortridge v. Macon*, and it must doubtless be attributed to the influence of the strong partisan feeling current at that period. The theory which is its only support is at variance with decisions of the United States Supreme Court holding that citizens of the Confederate States were entitled to all the right and privileges accorded to subjects of an enemy nation by international law.³⁴

The other exception to the rule suspending interest is suggested in *Lash v. Lambert*,³⁵ where the court attempts to distinguish between interest expressly provided for by the terms of the contract, and interest allowed by law in cases where the contract makes no provision for interest. It is there said that interest expressly stipulated for in the contract must be paid during war time. The Supreme Court of the United States, however, in the case of *Brown v. Hiatts*,³⁶ expressly refused to adopt this distinction and reaffirmed the strict rule.

A writer in the *Law Quarterly Review*³⁷ seems to have taken accurate exception to the rule suspending interest during war, on the ground that a distinction should be made between cases where the debt matures before the war, and cases where it matures during or after the war; that in the former, interest may reasonably be suspended during the war period, but that in the latter cases, since the debtor has no right, war or no war, to pay the debt before maturity without the creditor's consent, interest should be charged against the debtor until the debt falls due. From an examination of American decisions, however, it is believed that the learned

³²*Spencer v. Brower* (1870) 32 Tex. 663; *Lash v. Lambert* (1870) 15 Minn. 416.

³³*Supra*, footnote 27.

³⁴*Mrs. Alexander's Cotton* (1864) 69 U. S. 404; *The Prize Cases*, *supra*, footnote 2.

³⁵*Supra*, footnote 32.

³⁶*Supra*, footnote 2, at pp. 185-186. The language of the court is as follows:

"The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those in which the law allows interest, and contends that the revival of the debt in the first case, after the termination of the war, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle, which suspends its running during war."

³⁷Robert Agar Chadwick, "Foreign Investments in Time of War" (1904) 20 *Law Quarterly Rev.* 167.

writer would have greater difficulty, than he appears to anticipate, in reconciling this entirely reasonable and just theory with prevailing judicial opinion.³⁸ The only affirmative authority which has been found to support his argument (a case which he himself does not cite) is the language of the court in *Lash v. Lambert*, *supra*.³⁹

III.

Executory contracts entered into prior to the outbreak of war may be affected in either of two ways: (1) performance on the one side or the other may be rendered impossible, or (2) performance on the one side or the other may be rendered illegal. It is believed that, with this distinction in mind, the English and American cases may be classified and a general definition of what the law is on this subject attempted. Cases dealing with contracts between subjects of neutral nations, and between subjects of neutral nations and belligerent nations, will be considered in discussing this problem, since they illustrate the principles involved.

Before proceeding to analyze the cases, it is important to note here—as well as in the case of executed contracts already considered—that since by hypothesis the contracts we are dealing with are between residents in different countries, the lawyer's first duty is to determine the law of the country which shall govern the controversy and say whether or not the contracting party in default has been excused. For instance, suppose a contract to have been entered into between a German and an Englishman in London in June, 1914, and that the Englishman by such contract assigned to the German certain patent rights, and the German agreed to exploit these patent rights in Russia and pay royalties to the Englishman therefor. Suppose that after the war the Englishman sues the German in a French court for the latter's failure to perform this contract. What law will be applied by the French court which hears this case? The law usually applied in such a situation is the law of the place where the contract was made, and the leading case supporting such theory is *Jacobs v. Credit Lyonnais*.⁴⁰ By a contract made in London, the defendant

³⁸Cf. *Brown v. Hiatts*, *supra*, footnote 2. In this case the debt fell due after the outbreak of the Civil War and the contract stipulated that interest should be paid at 20% per annum. Nevertheless it was held that interest abated for the period of the war. See also, *Bigler v. Waller*, *supra*, footnote 27.

³⁹*Supra*, footnote 32.

⁴⁰(1884) 12 Q. B. D. 589.

agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on steamers to be provided by the plaintiffs. Only a part of the esparto was delivered, and when suit was brought to recover damages for the non-delivery of the remainder, the defendant pleaded that an insurrection in Algeria and the resulting military operations made performance impossible; that the law of Algeria (French) should govern; that such law excused non-performance on the ground of impossibility. The English court held, however, that English law—the law of the place where the contract was made—must govern its decision and that as English law did not recognize mere impossibility as an excuse for non-performance, the judgment for the plaintiff must be affirmed. The court appears to proceed upon the theory that the law applicable in such a case as this must be the law the parties to the contract intended should apply to their agreement, and that the “broad rule is, that the law of a country where a contract is made governs, as to the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties.”⁴¹ In other words, unless from the situation of the parties or a professed “construction” of the contract the court can say that the parties intended to be governed by some other law, the court will presume that the law of the place of making was intended to govern the performance of the contract.⁴² This is the theory applied by the English courts, not only in determining the law which is to judge of the efficacy of an excuse for non-performance, but also in determining what law shall say whether or not a valid contract has in fact arisen.⁴³ It may be

⁴¹At p. 600.

⁴²A recent case in New York applies the same rule. In *Richards & Co. v. Wreschner* (Sup. Ct. 1915) 156 N. Y. Supp. 1054, a German co-partnership in New York City agreed in January, 1914, to sell to the plaintiff in Boston 120 tons of antimony of a kind manufactured nowhere else than at a certain factory in Belgium, delivery to be at the rate of 15 tons per month, February to September, 1914. The written contract itself was executed in New York City. Beginning July 31, 1914, all exportations of antimony from Belgium were forbidden by Germany. The plaintiff sued for non-delivery of the antimony subsequent to that date. The plaintiff was allowed recovery on the ground that the contract having been made in New York, its nature, validity, obligation, and legal effect must be governed by New York law (the *lex loci contractus*) and that by New York law it was well settled that impossibility due to a foreign war did not excuse non-performance.

⁴³*Dictum* of Lord Mansfield in *Robinson v. Bland* (1760) 2 Burr. 1077; *In re Missouri S. S. Co.* (1889) 42 Ch. D. 321; *cf.* *Liverpool Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 9 Sup. Ct. 469; *Morgan v. New Orleans, etc.* R. R. (1876) 17 Fed. Cas. No. 9,804.

remarked, incidentally, that the English courts have been loath to discover an intention on the part of the contracting parties that English law shall not govern.

Like most rules of the conflict of laws, or so-called private international law, this rule laid down in *Jacobs v. Credit Lyonnais*, itself capable of being applied differently by different courts, is probably by no means universally acknowledged. No attempt will be made here to enter into a discussion of whether or not the law of the place of performance should not be the law to govern in these matters,⁴⁴ rather than the law intended by the parties (presumably the law of the place of contracting) as decided in the *Jacobs* case, nor to criticize the rule in the *Jacobs* case. It is merely desired to point out that this preliminary problem should be kept in mind in dealing with these contracts of an international aspect, especially since in many of the cases this point is not noticed at all, the courts assuming without discussion that the law of the forum is to be applied.

Assuming then, that by the rules of the conflict of laws English or American law may properly be applied in a given case in deciding whether or not a contracting party in default is to be excused, we may proceed to inquire what rules have been established by the English and American cases.

That war has made the performance of an executory contract impossible in fact, is not, without more, generally regarded by English and American courts as an excuse for non-performance. The common law rule is applied here, as in numerous cases where impossibility arises out of facts other than a state of war, that simple impossibility of performing a contract never excuses the promisor from his liability.⁴⁵ Several cases growing out of the interruption of commerce upon the outbreak of war are to be accounted for on this ground. In *Furness, Withy & Co. v. Muller & Co.*,⁴⁶ certain British ship owners contracted before the war to put one of their vessels at the command of a Maryland charterer between August 5 and 25, 1914. The owners duly tendered the vessel, but the charterer refused to furnish a cargo, although it would then not have been illegal for the vessel to have made the voyage to the ports designated in the charter. It was held that the ship owners might recover damages for the breach of this

⁴⁴See *Cox v. United States* (1832) 31 U. S. 172.

⁴⁵*Reid v. Alaska Packing Co.* (1903) 43 Ore. 429, 73 Pac. 337; *Rowe v. Peabody* (1911) 207 Mass. 226, 93 N. E. 604.

⁴⁶(D. C. 1916) 232 Fed. 186.

contract. In *Ducas Co. v. Bayer Co.*,⁴⁷ the defendant, an American agent of a German chemical house, contracted before the war to sell to the plaintiff, an American firm, 75 barrels of German dyes to be imported from Germany. The war made it impossible to obtain the supply contracted for, yet the defendant was unable to prove an embargo on dyestuffs by Germany at the time fixed for performance. The New York court held that the plaintiff might recover.⁴⁸

But hardship in certain cases seems to have procured a relaxation of the rule that impossibility of performance never excuses non-performance. The strict rule of the early common law that impossibility was never an excuse,⁴⁹ has given way, and exceptional cases, in which impossibility is accepted as a defense, are now generally collected under three broad heads:⁵⁰ (1) impossibility created by domestic law,⁵¹ (2) impossibility created by the destruction of the subject matter of the contract,⁵² and (3) impossibility created by the sickness, insanity or death of a party to a contract for personal service.⁵³ It follows, therefore, that when war makes performance of an executory contract impossible, though not unlawful, and such impossibility is of one of these classes, performance will be excused. Thus in *Alfred Marks Realty Co. v. "Churchills"*⁵⁴ the defendant contracted with the plaintiff before the war that defendant's advertisement should be

⁴⁷(Sup. Ct. 1916) 163 N. Y. Supp. 32.

⁴⁸To the same effect see, *Davis Co. v. Hoffman-LaRoche Chemical Works* (1917) 178 App. Div. 850, 166 N. Y. Supp. 179; *Gaves v. Miami S. S. Co.* (1899) 29 Misc. 645, 61 N. Y. Supp. 115.

⁴⁹Year Book, 22 Edw. IV, pl. 26; *Paradine v. Jane*, Aleyn, 27.

⁵⁰Anson on Contracts (11th Am. ed.) § 412 *et seq.*

⁵¹*Baily v. DeCrespigny* (1869) L. R. 4 Q. B. 180; *In re Shipton, Anderson & Co.* [1915] 3 K. B. 676. Impossibility created by foreign law is generally said to afford no excuse for non-performance. *Barker v. Hodgson* (1814) 3 M. & S. 267; *Ashmore & Son v. Cox & Co.* [1899] 1 Q. B. 436; *Tweedie Trading Co. v. McDonald Co.* (D. C. 1902) 114 Fed. 985; *Jacobs v. Credit Lyonnais*, *supra*, footnote 40; *Spence v. Chodwick* (1847) 10 Q. B. 517; *Medeiros v. Hill* (1832) 8 Bing. 231.

⁵²*Clarksville Land Co. v. Harriman* (1895) 68 N. H. 374, 44 Atl. 527; *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 156 Pac. 458; *Lorillard v. Clyde* (1894) 142 N. Y. 456, 37 N. E. 489.

⁵³*Robinson v. Davison* (1871) L. R. 6 Ex. 269; *Spalding v. Rosa* (1877) 71 N. Y. 40. In these exceptional cases performance is excused on one of two theories: (1) that it was an implied term of the contract that the promisor was not to be bound upon the happening of the contingency making performance impossible; or (2) that conditions have so changed between the time of contracting and the time for performance that it would be inequitable to compel performance. See 19 Harvard Law Rev. 462.

⁵⁴(1915) 90 Misc. 370, 153 N. Y. Supp. 264.

inserted at a certain price in a "Souvenir and Program of International Yacht Races" which the plaintiff was compiling. The international yacht races were subsequently abandoned on account of the war. The plaintiff, however, proceeded to publish and offer for sale the souvenir program, with defendant's advertisement therein, and sued defendant for failure to pay for the advertisement. The plaintiff was denied recovery on the ground that "where the performance of an agreement depends upon the happening of an event over which neither party has any control, an implied condition will be read into the agreement to the effect that the contract shall be abrogated upon the nonhappening of such an event."⁵⁵ In this case performance, though not made unlawful by the war, seems to have been regarded as impossible by reason of the destruction of the subject-matter of the contract, and was therefore excused.

But more frequently the performance of the contracts herein considered, aside from all question of impossibility, will become, upon the outbreak of war, actually illegal by the law of the jurisdiction whose law the court adopts in deciding the case. As has already been said, the courts have generally assumed, doubtless in the absence of citation of foreign law by counsel, that the law of the forum governs. This being the case, it has frequently been held, that if such law renders further performance of the contract unlawful, such further performance is excused, the contract being forthwith declared illegal and at an end. The leading case in illustration of this is *Esposito v. Bowden*,⁵⁶ decided in 1857, and frequently cited. The plaintiff, an Italian shipowner, contracted with the defendant, a British merchant, that his vessel should proceed from a British port to Odessa, there to load with a cargo of specified goods from the defendant's factors and convey the same to Falmouth. Before the vessel arrived at Odessa, England had declared war on Russia, and in consequence no cargo was loaded. It was held that this non-performance by the defendant was excused, since it appeared that the defendant could not have loaded the vessel without trading with the enemy, which was of course unlawful. The contract was accordingly said to be "dissolved." Two recent English cases, arising out of situations created by the present war, are also illustrative of the same rule. In *Arnhold Karberg & Co. v. Blythe, etc., Co.*,⁵⁷ decided in 1915, the

⁵⁵At p. 371.

⁵⁶*Supra*, footnote 12.

⁵⁷*Supra*, footnote 5.

contract involved was between two English merchants, the one agreeing to sell and the other to buy beans, shipped from certain Chinese ports to Naples and Rotterdam, payment to be made in London upon presentation of the bills of lading. The seller shipped the goods in July, 1914, on German vessels and took German bills of lading. Upon the outbreak of war these German vessels put into ports of refuge in the East. The seller tendered the bills of lading to the buyer in London, but the buyer refused to accept the same or pay for the beans, and the seller brought suit. The Court of Appeal held that the non-performance of the buyer was excused; that the bills of lading tendered by the seller represented executory contracts between German shipmasters and the English shipper, performance of which had become unlawful; that such contracts were therefore void and the buyer was not obliged to accept the same as a due discharge of the seller's obligations. In *Zinc Corporation, Ltd. v. Hirsch*,⁵⁸ a British corporation, had contracted, in 1908 and 1910, to sell to German merchants the whole of its production of zinc concentrates from its Australian mines. By this contract the British corporation was prohibited during the life of the contract from selling any zinc concentrates to any other parties, and it was also provided that upon the occurrence of strikes, floods, acts of God, *etc.* preventing or delaying the carrying out of the contract, the contract should be suspended during the continuance of such disability. After the outbreak of the present war the British corporation brought action to have the contract declared dissolved. The court argued that, granted that war was one of the contingencies during the continuance of which the contract provided for a suspension of deliveries, nevertheless it would be unlawful to allow the rest of the contract to stand, even though no deliveries were made, since to do so would require a certain amount of commercial intercourse with the enemy, and, by reason of the clause in the contract prohibiting sales to other parties, would be of benefit to the enemy's trade during the war, and would prevent the corporation from using its resources for the benefit of England. Thus it will be seen that every executory contract, the performance of which may be declared illegal or contrary to public policy, becomes thereafter unenforceable.⁵⁹ As nearly every executory contract involves a certain amount of

⁵⁸[1916] 1 K. B. 541.

⁵⁹But if performance is declared illegal by foreign law, *i. e.* law different from the law applied by the court which tries the case, non-performance will not be excused. *Cf. supra*, footnote 51.

commercial intercourse between the contracting parties, and as intercourse between residents in warring countries is illegal, the broad rule, so frequently announced, that executory contracts between residents in the belligerent countries are extinguished upon the outbreak of war,⁶⁰ is approximately correct.⁶¹

No decision has been found which goes farther in excusing non-performance occasioned by war than that of the Supreme Court of the United States in the recent case of *North German Lloyd v. Guaranty Trust Co.*⁶² The Kronprinzessin Cecilie, owned by a German corporation, sailed from New York for Bremerhaven via Plymouth and Cherbourg on July 28, 1914, having on board a quantity of gold, which the owners of the vessel had contracted to transport to the latter ports. When distant 1070 nautical miles from Plymouth, the master of the vessel, knowing that war had been declared by Austria against Servia, that Germany had declined a proposal for a conference of Ambassadors at London, that orders had been issued for the German fleet to concentrate in home waters, that British battle squadrons were ready for service, that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London stock exchange; and knowing, also, that he had proceeded as far as he could and still have coal enough to return to New York, put back to America. War between Germany, and France and England had not in fact been declared when the vessel thus turned back, and if nothing unforeseen had happened the vessel might have delivered the gold and escaped capture by the margin of a few hours. Libels, alleging breach of this contract, were filed against the vessel. The Supreme

⁶⁰Hanger v. Abbott, *supra*, footnote 3; M'Grath & Jones v. Isaacs, *supra*, footnote 3; Brown v. Delano, *supra*, footnote 3.

⁶¹Since, however, contracts may infrequently arise which, though executory, involve no possibility of trading with the enemy, the principle of the rule should be kept in mind, rather than any strict maxim applicable alike to all cases. Buchanan v. Curry, *supra*, footnote 4. See also Statham v. New York Life Ins. Co., *supra*, footnote 2, at p. 598, where it is said: "If an *ante bellum* contract is dissolved at all, it is because its performance is inconsistent with the duties and allegiance which the parties owe to their respective countries, and involves some violation or infringement of these, and which has not been performed in whole or part by either party. The annihilation of such a contract would not be injurious to either party, but would rather dissolve their inconvenient relations. * * * If the contract may be preserved or performed without the transmission of money or property from one enemy to the other, or without their intercourse or correspondence, then no principle of law or policy, arising out of a state of war between their respective countries, would demand an abrogation of the contract, or its non-performance."

⁶²61 Law Ed. 490. Same case, The Kronprinzessin Cecilie (1917) 244 U. S. 12, 37 Sup. Ct. 490.

Court, Mr. Justice Pitney and Mr. Justice Clarke dissenting, reversing the decree of the circuit court of appeals, held that the libels should be dismissed. The opinion is written by Mr. Justice Holmes and proceeds upon the theory that it was an implied term of the contract that the anticipated prohibitions and dangers attendant upon performance should excuse non-performance. In some of the cases cited in the opinion impossibility was held to constitute a defense, but it is believed that neither anticipated impossibility nor anticipated illegality influenced the decision so much as the consideration of the grave risk to the valuable vessel and cargo and to the passengers, should the voyage have been continued.⁶³

In addition to what has been said it should be noted that certain provisions of the recent Trading with the Enemy Act permit a cancellation of contracts entered into before the war with those who are now our enemies. Thus section 4a provides that insurance companies organized within the United States may abrogate contracts entered into prior to the beginning of the war with enemy or ally of enemy insurance or reinsurance companies, by serving 30 days' written notice upon the President of election to do so. And by section 8b it is provided that "Any contract entered into prior to the beginning of the war between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery, during or after any war in which a present enemy or ally of enemy nation has been or is now engaged, of anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation by serving thirty days' notice in writing upon the alien property custodian of his or its election to abrogate such contract." By taking the course prescribed by these sections, certain American obligors are enabled to absolve themselves from all liability for future non-performance of certain specified types of contracts, so far as American law is applicable and capable of excusing such non-performance.

But while non-performance of one of the parties to a contract may thus be excused because performance would be illegal, or impossible for reasons recognized by the law of contracts as constituting an excuse, performance by the other contracting party may be neither illegal nor impossible. Yet the cases frequently

⁶³Cf. *Atkinson v. Ritchie* (1809) 10 East 530 which arrived at a different result on similar facts.

speak of the contract as being "dissolved" and certain it is that when one party is declared to be absolved from liability to perform, the other party is generally discharged from future performance. Suppose, for instance, that prior to August, 1914, an American citizen had entered into a contract with an Austrian corporation, by the terms of which the American assigned to the Austrian corporation certain patent rights, and agreed to assign others as they should be perfected, the same to be exploited by the Austrian corporation in Russia, and the American to receive royalties from such exploitation. Upon the outbreak of war between Austria and Russia, and before the United States entered the conflict, what would be the rights of the parties to this contract? Here, again, it is believed that well defined principles of the law of contracts would solve the difficulty. Performance by the American party to this contract would be neither impossible nor unlawful, the American being a neutral. Performance by the Austrian corporation would, however, be at least unlawful, as involving commercial intercourse with Russia. In consequence, the Austrian corporation would cease to perform. The contract contemplated, however, that the consideration flowing to the American would be the immediate introduction and exploitation of his patent rights in Russia. In other words, the prompt performance by the Austrian corporation of its obligations would be an implied condition precedent to any obligation upon the part of the American to assign future patent rights or otherwise perform his obligations under the contract.⁶⁴ Such implied condition precedent not having been performed, the American would be excused from further performance on his part or any future liability. The breach of the Austrian corporation would go to the essence of the contract,⁶⁵ and the American might lawfully treat the contract as at an end.⁶⁶

⁶⁴See Costigan, *Performance of Contracts* (Pamphlet ed. 1911) p. 46 *et seq.*

⁶⁵Chitty on Contracts (16th ed.) p. 771, where it is said, "The general question in such cases is whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff, a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects the performance of the original contract, and may be compensated for in damages. In the former case, the stipulation will be taken to have been intended to be a condition precedent; in the latter it will not."

⁶⁶*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A. 1903) 121 Fed. 298; *Missouri Pac. Ry. v. Yarnell* (1898) 65 Ark. 320, 46 S. W. 943; *Alachua Phosphate Co. v. Anglo-Continental Guano Works* (1906) 51 Fla. 143, 40 So. 74; *Willington v. West Boylston* (1826) 21 Mass. 101; *Pollock, Contracts* (3rd ed.) 427.

A leading case which admirably illustrates this principle is *New York Life Insurance Co. v. Statham*,⁶⁷ decided by the Supreme Court of the United States in 1876. The life of X, a resident of Mississippi, was insured by a New York corporation prior to the Civil War. Premiums were paid regularly until the outbreak of the Civil War, and then by reason of the interruption of commercial intercourse, they were not paid for several years. After the war and the death of X, suit was brought on this policy. It was held that there could be no recovery, on the ground that the prompt payment of premium was a condition precedent to liability on the policy; that a failure to pay premiums was a breach going to the essence of the contract, which excused the insurance company from further performance, and it made no difference that the failure to pay premiums was due to the war. Mr. Justice Bradley says,⁶⁸

"the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

"The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."

⁶⁷*Supra*, footnote 18. *Accord*: *Abell v. Pennsylvania Mut. Life Ins. Co.* (1881) 18 W. Va. 400; *O'Reily v. Mutual Life Ins. Co.*, *supra*, footnote 2; *contra*, *Mutual Benefit Life Ins. Co. v. Hillyard*, *supra*, footnote 4.

⁶⁸At pp. 31-32.

Upon this reasoning it makes no difference whether or not the non-performance of the contracting party in default is excused, for the very fact of non-performance, if it deprives the other contracting party of the consideration for which he bargained, will excuse performance by the other party to the contract.

This reasoning, also, serves to classify a type of case generally regarded as an exception to the rule usually announced regarding executory contracts.⁶⁹ Where war has not been declared, but an embargo has been laid, it is generally said that a contract, the performance of which is prevented by such embargo, is not "dissolved" but merely "suspended." This means nothing more than this: where the performance of A is prevented by an embargo, non-performance by A is excused during the continuance of the embargo. But since the embargo is regarded as a temporary expedient, likely at any moment to be lifted, B, the other party to the contract, is not ordinarily permitted to treat such non-performance by A as a breach going to the essence of the contract, at least until a reasonable time has elapsed without the embargo being raised. In this sense the contract is "suspended" for a reasonable time. If the embargo is raised within a brief period, A and B must both resume performance of the contract.

The preceding paragraphs have by no means exhausted the possibilities of the subject discussed. They will have served their purpose, if they have suggested to the reader: first, that well settled principles of the law of contracts are as applicable to contracts affected by war, as to contracts made and performed in time of peace; and secondly, the specific application of such principles to situations which frequently arise by reason of war. The confused language, the frequent use of catch phrases in place of reasoning, and the absence of argument upon general principles of contract law, to be found in the decisions upon this subject—all tending to perplex the student and practitioner—must be the excuse for this necessarily limited attempt at general classification and definition. The results reached, aside from the effect of particular statutes, may be briefly summarized as follows: Contracts between residents in opposing belligerent countries made after the outbreak of war are void as against public policy, if by any possibility communication or intercourse with the enemy

⁶⁹Millar & Co. Ltd. v. Taylor & Co. Ltd. [1916] 1 K. B. 402; Palmer v. Lorillard (N. Y. 1819) 16 Johns. *348; Odlin v. Insurance Co. of Pa. (1808) 18 Fed. Cas. No. 10,433; Ogden v. Barker (N. Y. 1820) 18 Johns. *87; Baylies v. Fettyplace (1811) 7 Mass. *325.

country will result therefrom. Debts owing to residents in an enemy country are not extinguished by the war, but the creditor may not enforce payment while war lasts. The creditor is protected against the running of the statute of limitations, but is not allowed to recover interest during the period of the war, even though the debt matures during such period. The performance of executory contracts is often rendered impossible and in certain exceptional cases, recognized by the common law, non-performance of such contracts will be excused on the ground of impossibility. The performance of executory contracts also very frequently becomes unlawful, whereupon non-performance will be excused on the ground of public policy. Where one party to an executory contract fails in performance by reason of the war, if such failure goes to the essence of the contract, the other contracting party will be excused from further liability and the contract will be at an end. Finally, the applicability of these rules to a given controversy should be governed by the principles of the conflict of laws.

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NOTES.

STATUTORY DECLARATIONS OF PUBLIC NUISANCE.—As an incident of the recrudescence of administrative law and personal government during the past half century,¹ there is to be noted a vast number of statutes

¹Pound, *Justice According to Law*, 14 *Columbia Law Rev.* 12-26; *The Revival of Personal Government*, *Proceedings of the Bar Ass'n. of N. H.*, 1917, 13.

declarative of nuisances² and variously designating the particular subject-matter as "nuisance", "public nuisance", "common nuisance", "public menace",³ or "public pest".⁴ Yet the same evils had customarily been legislated against as being unlawful, forbidden or misdemeanors or attacked under the common law of public nuisance, without the avail of a statutory declaration of a nuisance.⁵

The advantages which have urged statutory declarations of nuisance have been the numerous flexible forms of action which the law makes available for the abatement of a nuisance. As to procedures,⁶ there are:

²For example: Encroachment on public lands, Mass. Rev. Laws 1902, c. 53 § 1, or waters, *id.* c. 196 § 24, Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 1435. General conservation of natural resources:—Howell's Mich. Stat. (2nd ed.) § 4297, N. M. Stat. 1915, § 247, Vernon's Sayles' Tex. Civ. Stat. 1914, Art. 5011h (uncapped artesian wells); Deering Gen. Laws Cal. 1915, Act. No. 23476, Gen. Stat. Minn. 1913, § 5167, Comp. Laws N. D. 1913, § 623 (noxious weeds); Sess. Laws Minn. 1917, c. 252 § 1, Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 1434 (fish nets, boats *etc.* used unlawfully); *id.* 1422 (unlicensed game park); Laws Wash. 1917, c. 105 § 3 (unguarded fire on forest land); Gen. Laws Ore. 1911, c. 278 § 5 (forest without adequate fire protection); 1 Idaho Rev. Code § 1315, 1 Comp. Stat. N. J. 33, N. M. Ann. Stat. 1915, § 2730 (diseased plants); Pub. Laws R. I. 1917, c. 1540 § 1 (plant diseases); Rev. Stat. Me. 1916, c. 38 § 1; Pub. Stat. N. H. Supp. 25 (gypsy moth); Fla. Comp. Laws 1914, § 3689 (diseased animals); Sess. Laws Alaska 1913, c. 81 (pollution of waters); Deering Gen. Laws Cal. 1915, Act. No. 4368 (moored house-boats). Buildings used for:—Rev. Stat. Ariz. 1913, Civ. Code § 4340, Laws Me. 1917, c. 155 § 3 (bawdy house), Sess. Laws S. D. 1917, c. 281 § 65, Laws Utah 1917, c. 2 § 10 (saloons); Comp. Stat. N. D. 1913, § 10177 (opium smoking); Rev. Stat. Me. 1916, c. 23 § 9 (manufacture of powder); Mass. Rev. Laws 1902, c. 101 § 12 (gambling); Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 327 (institutions which maltreat children). Protection of health:—Fla. Comp. Laws 1914, § 3691, Rev. Stat. Mo. 1909, § 4797 (unclean slaughter house); Jones & Add. Ill. Stat. 1913, § 10802 (building and apparatus used in unsanitary preparation of food); Cal. Stat. 1909, 311 (property infested with rats); Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 6 (adulterated foods); Fla. Comp. Laws 1914, § 3688 (keeping hogs in city); Laws N. Y. 1916, c. 408 (water where mosquitoes breed); Mass. Rev. Laws 1902, c. 102 § 122, Laws Mo. 1915, 364 (emission of dense smoke). Safety:—Page & Adams Ann. Ohio Gen. Code § 1002-1 (factory without safety devices); Mass. Rev. Laws 1902, c. 101 § 1 (burned building); Rev. Stat. Me. 1916, c. 30 § 41, Hogg W. Va. Code 1913, § 791 (buildings without fire escapes). Protection of morals:—Laws Hawaii 1915, 272 (publishing obscene books); N. Y. Consol. Laws 1909, 2663 (horse racing for betting); *id.* 2708 (lottery). Esthetics:—Deering Gen. Laws Cal. 1915, Act No. 52 § 4, Mass. Rev. Laws 1902, c. 208 § 155, 3 Purdon's Dig. Penna. (13th ed.) 3334 (signs and posters). Miscellaneous:—Gen. Stat. Minn. 1913, § 6055 (dogs that habitually chase teams); Jones & Add. Ill. Stat. Ann. 1913, § 9634 (willow trees planted alongside highways); *id.* § 9997 (person camping alongside highway).

³Laws Maine, 1917, c. 178.

⁴Laws New Hampshire, 1917, c. 187, § 4.

⁵See, general indexes to statutes of California, New York and other states under such titles as "Crimes" and "Misdemeanors", for such declarations of unlawfulness and misdemeanors; 1 Wood, Nuisance (3rd ed.) c. 2, for public nuisances at common law. Cf. Freund, Standards of American Legislation, 65-68.

⁶A somewhat similar terminology in which "method of execution" is used for "procedure" and "means of execution" for "ultimate device", is made use of in Goodnow, Principles of the Administrative Law of the United States, 346-369.

(1) Criminal court procedure instituted by an indictment brought by the state⁷ and resulting in a judgment imposing a penalty on the person or directing action against a *res*;⁸ (2) Equity proceedings instituted by a bill for an injunction⁹ brought by the state or a private party¹⁰ and resulting in a decree binding the person or directing action against a *res*;¹¹ (3) Administrative proceedings¹² resulting in an order to the person¹³ or summary administrative action against a *res*;¹⁴ (4) Direct action by an individual against a *res* in which, of course, no procedure is involved.¹⁵ As to the ultimate devices, all manner of them have been applied,—fine and imprisonment to the person; destruction or sale of property, its deportation, closing or vacating of buildings, rehabilitation and placing in a lawful condition, and quarantine to a *res*.¹⁶ The employment of this extraordinary group of procedures and ultimate devices against nuisances having become familiar and customary to the courts, naturally has been extended to those nuisances declared to be such by statute. Consequently, when in accord with modern tendencies, the responsibility for instituting abatement proceedings for either common law or statutory public nuisances is placed upon an administrative officer or body, such officer has concentrated

⁷Waters v. Newark (1894) 56 N. J. L. 361, 363.

⁸1 Hawkins, Pleas of the Crown (Curwood's ed.) 695 § 15; 2 Wood, *op. cit.* § 864; Barclay v. Commonwealth (1855) 25 Pa. 503; Wright v. State (1914) 130 Tenn. 279, 282, 170 S. W. 57.

⁹Waterman's Eden, Injunctions (3rd ed.) *262-3; State v. Mayor of Mobile (Ala. 1837) 5 Porter 279, 312; 7 Columbia Law Rev. 357. Cf. 8 Illinois Law Rev. 19; State v. Ehrlick (1909) 65 W. Va. 700, 64 S. E. 935.

¹⁰At common law an individual could not bring a private action to enjoin a public nuisance unless he could show special injury to himself, *i. e.*, the public nuisance was also a private nuisance to him. But under statutes providing for the institution of injunction proceedings by private individuals, many courts affirm the right without discussing the question of special injury. Carleton v. Rugg (1888) 149 Mass. 550, 22 N. E. 55; Davis v. Auld (1902) 96 Me. 559, 53 Atl. 118. A few jurisdictions sustain statutes permitting the individual to sue on relation to the attorney-general on the theory that the individual represents the public and a public officer need show no injury. Littleton v. Fritz (1885) 65 Iowa 488, 496, 22 N. W. 641; State *ex rel.* Martin v. Bradley (1901) 10 N. D. 157, 86 N. W. 354.

¹¹Laws Me. 1917, c. 155.

¹²Parker & Worthington, Public Health & Safety, § 232.

¹³Queen v. Llewellyn (1884) 13 Q. B. D. 681.

¹⁴Lawton v. Steel (1894) 152 U. S. 133, 14 Sup. Ct. 499.

¹⁵1 Bishop, New Criminal Law (8th ed.) §§ 1080, n. 2, 1081; Meeker v. Van Rensselaer (N. Y. 1836) 15 Wend. 397.

¹⁶For recent statutory illustrations of various ultimate devices besides fine and imprisonment, see:—N. Y. Consol. Laws 1909, Labor Law § 113a (Compulsory medical treatment of persons); Sess. Laws Idaho 1917, c. 45; 34 Stat. 771, 8 U. S. Comp. Stat. 1916 § 8726 (sale); Sess. Laws Minn. 1917, c. 469 (destruction); N. Y. Consol. Laws 1909, Labor Law § 81 (tagging dangerous machines); Laws N. H. 1917, c. 150, § 4 (labeling eggs); Laws Md. S. S. 1917, c. 36, § 106a-b-c (repairing buildings); Laws Neb. 1917, c. 159 § 3 (dipping cattle); Laws Colo. 1917, c. 131, §§ 3, 4 (fumigating plants); Laws N. H. 1917, c. 12, § 1 (removal of brush); Gen. Acts Mass. 1917, c. 208, § 10 (publicity); Laws Neb. 1917, c. 187, § 32 (closing up building); N. Y. Consol. Laws 1909, Tenement House Law § 122 (vacating building); 2 Comp. Stat. N. J. 2520 (liberating fish); Sess. Laws S. D. 1917, c. 361, § 13 (quarantine).

in his hands the most drastic methods of enforcement that the law can give.

The preceding outline of procedures and ultimate devices would seem also to suggest the reason for such difficulties in the definition of "public nuisance" as Mr. Bishop experienced when he accused the English language of not possessing a suitable supply of "words to express the idea exactly, comprehensively, in a single sentence, and in a way fully to satisfy legal criticism".¹⁷ A determination that a nuisance exists or a legislative declaration of nuisance merely makes possible the use of the above groups of procedure and ultimate devices, just as a declaration of felony and misdemeanor demands the use of a criminal court procedure and fine or imprisonment. The same public offense may be both a crime and a nuisance, while the particular denomination serves to designate the mode of attack that the law sanctions for the particular offense.¹⁸ But it appears clear that the subject-matter of nuisance was never limited, as the older writers indicated, to an offense by a person,¹⁹ *i. e.*, the act of committing a nuisance, but includes physical property in itself injurious, and conditions or states of being the existence or continuance of which is injurious to the public. Neither of these latter involves the element of personal responsibility. Each is here described by the term *res*. Any of the procedures above outlined is capable of an action *in rem* directed against a *res* instead of the person responsible for a nuisance, and the declaration of nuisance makes possible the use of these procedures and ultimate devices in abating a *res* as well as an offense. So any particular offense or *res*, injurious to the public, may be abated as a public nuisance, provided that it is declared by statute to be such.²⁰ Thus the category of nuisance may be broadened indefinitely²¹ so long as it is shown that the particular procedure and ultimate devices employed are reasonably necessary to the accomplishment of the legislative purpose,²² and may be sustained on the same grounds as any other exercise of the police power.²³

¹⁷1 Bishop, *op. cit.* § 1072 n. 4.

¹⁸Both crimes and nuisances are usually classified by text writers under the same heading, public wrongs, with little sensible differences in definition. See 4 Bl. Comm. 5, 166; 1 Bishop, *op. cit.* §§ 32, 1072 (1).

¹⁹1 Hawkins, *op. cit.* 692; 4 Bl. Comm. 166.

²⁰Legislatures may declare new species of nuisances not known at common law. *Lawton v. Steel* (1890) 119 N. Y. 226, 23 N. E. 878; *State v. Tower* (1904) 185 Mo. 79, 84 S. W. 10; *Mugler v. Kansas* (1887) 123 U. S. 623, 8 Sup. Ct. 273.

²¹*Cf.* the statement of Kenshaw, J., "it would tax the acumen of the wisest body of lawmakers to describe with particularity every act the doing of which, in our complicated civilization, would constitute a nuisance." *People v. Lee* (1895) 107 Cal. 477, 481, 40 Pac. 754.

²²*State ex rel. Wilcox v. Ryder* (1914) 126 Minn. 95, 107, 147 N. W. 953, 958.

²³*Lawton v. Steel*, *supra*, footnotes 14 and 20; *Train v. Boston Disinfection Co.* (1887) 144 Mass. 523, 11 N. E. 929; *Moses v. United States* (1900) 16 App. D. C. 428; *Mugler v. Kansas*, *supra*; *cf.* *Quintini v. City of Bay St. Louis* (1887) 64 Miss. 483, 1 So. 625. Some courts have gone to the extreme of stating that it is not competent to introduce evidence to show that a nuisance declared to be so by statute is not so in fact. *Train v. Boston Disinfecting Co.*, *supra*; *Watertown v. Mayo* (1872) 109 Mass. 315; *Carleton v. Rugg*, *supra*; *Stead v. Fortner* (1912) 255 Ill. 468, 99 N. E. 680; *Goodnow*, *op. cit.* 352; *cf.* *Harrington v. Providence* (1897) 20 R. I. 233, 38 Atl. 1.

Consequently, in the recent case of *Eccles v. Ditto* (N. Mex. 1917) 167 Pac. 726,²⁴ the court found no difficulty in approving a statutory addition to the list of public nuisances,—that of an unsecurely capped artesian well.

It is customary for statutory declarations of nuisances to designate physical property as the nuisance.²⁵ But if the property is not injurious in itself,²⁶ then it is no nuisance in fact, but has served as a convenient method of designating the real nuisance, the acts or conditions involving the employment of such property. Property has a value to society as a whole, and the law of nuisance in its refusal to permit excess abatement well illustrates the tendency of the law to preserve that value. Consequently innocent property may not be destroyed in the abatement of a nuisance,²⁷ not even if the statutory declaration designates such property as the nuisance. In *State ex rel McCurdy v. Bennett*²⁸ the court, though given by statute the power to dispose of the furnishings of a disorderly house, held that it had no power to destroy such property but only to detain it during the one year period in which the house was to be closed.²⁹ It would seem to follow that no ultimate device may be employed when one less drastic would serve

²⁴See also *Ex parte Elam* (1907) 6 Cal. App. 233, 91 Pac. 811; 12 Illinois Law Rev. 152.

²⁵See footnote 2, *supra*.

²⁶Remnants of Puritanism have prevented the recognition of gambling apparatus as innocent property. *Mullen & Co. v. Moseley* (1907) 13 Idaho 157, 90 Pac. 986; *Garland Novelty Co. v. State* (1902) 71 Ark. 138, 71 S. W. 257. For examples of property entirely harmful or of but little lawful commercial value see:—38 Stat. 194, 6 U. S. Comp. Stat. 1916, §§ 5299, 5301 (obscene books); Sess. Laws S. D. 1917, c. 361, § 16 (tubercular cow); Laws Mo. 1917, 133 § 2 (carcass of a diseased hog); Laws Pa. 1917, No. 236, § 10 (diseased plants); Sess. Laws Idaho 1917, c. 132, § 3 (noxious weeds); *Adams v. City of Milwaukee* (1913) 228 U. S. 572, 577n. (milk from untested cows); Sess. Laws Minn. 1917, c. 469 (building in dangerous condition, but not the materials after it is torn down).

²⁷*Barclay v. Commonwealth, supra*; *Wright v. State, supra*; *Bloomhuff v. State* (Ind. 1846) 8 Black. *204; *Ely v. Board of Supervisors* (1867) 36 N. Y. 297; *Welsh v. Stowell* (Mich. 1849) 2 Doug. 332; *State v. Paul* (1858) 5 R. I. 185; *Miller v. Burch* (1869) 32 Tex. 208; *Earp v. Lee* (1873) 71 Ill. 193; 19 Cent. L. J. 42, 44. Statutes often avoid the destruction of innocent property by requiring the removal and sale of chattels or the closing up of buildings. *State ex rel. Robertson v. New England, etc. Co.* (1914) 126 Minn. 78, 147 N. W. 951.

²⁸(N. D. 1917) 163 N. W. 1063.

²⁹A statute providing that such property be seized and sold is valid, *State ex rel. Thrasher v. Smith* (1915) 275 Ill. 256, 114 N. E. 31; *State ex rel. Kern v. Jerome* (1914) 80 Wash. 261, 141 Pac. 753; *People ex rel. Bradford v. Barbieri* (Cal. 1917) 166 Pac. 812, even though the owner is an innocent party. *State ex rel. Robertson v. New England, etc. Co., supra*; cf. Comp. Laws N. D. 1913, § 9646. Of course depriving the public of the use of a building in a lawful manner would seem to be destroying a valuable property right of the public, but closing a building used for a saloon or disorderly house for a reasonable period, as one year, has been repeatedly sustained, as valid action. See cases *supra* and the recent case of *People v. Casa Co.* (Cal. 1918) 169 Pac. 454.

to abate the injury to the public,³⁰ and so *Eccles v. Ditto*³¹ declares that wastage of water should not be stopped by repairing the artesian well if the facts show that plugging would suffice. Two exceptions, however, exist to this principle of the conservation of the social value of property: when the value of property is small and the loss to society by its destruction would be relatively unimportant as compared with the expense of removal and sale,³² and also when property forms a link in the continuance or spread of a dangerous condition or is necessary to the prevention of a danger.³³ In either case destruction is a permissible ultimate device.

Further, declarations that associated physical property is the nuisance, when in fact the nuisance is far broader in scope, often make it impossible to take satisfactory abatement measures. Thus, where the white pine blister rust is devastating the eastern forests, a declaration that infested trees are a nuisance³⁴ would not suffice, for this would limit abatement measures to the infested trees only. But upon a declaration that the disease itself is a nuisance³⁵ a much wider range of action would probably be permitted, and it is believed that the destruction of infested and undiseased trees in order to prevent the spread of the fungus, quarantine of plant and lumber shipments, and the fumigation of plant stock and lumber products, would be some of the available ultimate devices.

The law of nuisance aided by statutory declarations has already gone a great way toward covering the entire field of police regulation and providing for the greatest possible flexibility and effectiveness in enforcing legislative policies. Its future limitations lie in the legislative and administrative ability to choose the proper procedures and ultimate devices for the particular problem and in an avoidance of the current practice of designating, by a sort of legal synecdoche, innocent property as the nuisance. That the courts have done their part and taken an unusually liberal attitude towards the statutes involved³⁶ has made possible swift advance in the administration and enforcement of much of the field of police legislation.

³⁰*Eckhardt v. City of Buffalo* (1897) 19 App. Div. 1, 46 N. Y. Supp. 204, 210; *People v. High Ground Dairy Co.* (1915) 166 App. Div. 81, 151 N. Y. Supp. 710; *State v. Schaefer* (1906) 45 Wash. 9, 87 Pac. 949; *Finley v. Hersey* (1875) 41 Iowa 389; *Shiras v. Olinger* (1879) 50 Iowa 571; *cf. People v. Weiner* (1915) 275 Ill. 274, 110 N. E. 871; *Inhabitants of Belmont v. New England Brick Co.* (1906) 190 Mass. 442, 77 N. E. 504, and the recent case of *Inhabitants of Skowhegan v. Heselton* (Me. 1917) 102 Atl. 772. *Laws Utah* 1917, c. 2 § 18; *Sess. Laws Minn.* 1917, c. 252.

³¹*Supra*, at p. 730.

³²*Lawton v. Steel, supra*, footnote 20; *cf. Nelson v. City of Minneapolis* (1910) 112 Minn. 16, 23, 127 N. W. 455; *Ross v. Desha Levee Board* (1907) 83 Ark. 176, 103 S. W. 380.

³³*Cf. Cases of the King's Prerogative in Salt-Petre* (1777) 7 Coke *12; *Pub. Laws R. I.* 1917, c. 1540 § 4; *Laws Neb.* 1917, c. 1; *Gen. Acts. Mass.* 1917, c. 121, § 1.

³⁴*Sess. Laws Idaho* 1917, c. 141; *Pub. Laws R. I.* 1917, c. 1540, § 1; *Pub. Acts. N. H.* 1917, c. 187, § 1; *Laws Me.* 1917, c. 178, § 1.

³⁵For similar declarations of conditions as nuisances, in connection with housing acts see *Stat. Cal.*, 1917, c. 736, § 10; *Sess. Laws Minn.* 1917, c. 137, § 2 (18); *Pub. Acts. Mich.* No. 167, § 2.

³⁶*Cf. Pound, Common Law & Legislation*, 21 *Harvard Law Rev.* 383.

RIGHT TO FIX THE RESALE PRICE OF CHATTELS.—At common law an endeavor to fix the resale price of an article was not necessarily objectionable¹ but such endeavors were subject to limitations of policy. Total or substantial restraints on the alienation of property were void² but the fixing of the retail price would not generally be such a restraint as contemplated by the rule.³ The common law rules against restraint of trade and competition were not violated so long as the endeavor did not proceed from nor tend to create a monopoly and was not unreasonable as regards the public interest.⁴ Hence the early cases generally sustained the validity of contracts fixing the resale price where it was found as a matter of fact that no canon of policy had been infringed.⁵

But the rapid expansion of business soon confronted the courts with a much more imposing and seemingly menacing situation. Attempts were made by means of vast series of contracts with purchasers over wide areas to control the resale price of commodities. Such efforts attracted particular attention when practiced by patentees or manufacturers having a monopoly of production by virtue of a secret process. State courts upheld such contracts where it was thought there was no unreasonable restraint of trade and the public interest was not threatened.⁶

In the federal courts the agreements were sustained at first but for another reason. In the case of patented goods it was assumed and held that the monopoly carried with it the power to contract to restrict the resale price.⁷ Goods not patented but manufactured under a secret process were afforded a similar protection.⁸ Cases involving

¹*Elliman Sons & Co. v. Carrington & Sons, Ltd.* [1901] 2 Ch. 275; *Walsh v. Dwight* (1899) 40 App. Div. 513, 58 N. Y. Supp. 91; *In re Greene* (C. C. 1892) 52 Fed. 104; *cf. New York Ice Co. v. Parker* (N. Y. 1861) 21 How. Pr. 302, where the court assumed the validity of the contract.

²Co. Lit. § 360; Gray, *Restraints on Alienation* (2nd ed.) §§ 27, 28.

³Even in the case of realty the fixing of the sale price is not a void restraint on alienation. *Rackemann v. Riverbank, etc. Co.* (1896) 167 Mass. 1, 44 N. E. 990; see *Rice v. Hall* (1897) 19 Ky. L. R. 814, 42 S. W. 99; *cf. Bennett v. Washington Cemetery* (1890) 24 Abb. N. C. 459, 11 N. Y. Supp. 203. A covenant as to the price of personalty would probably be considered a restraint *in personam* rather than a modification of the title of the res and therefore not within the rule.

⁴*Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 137 Pac. 144; *Stewart v. Rawleigh Med. Co.* (Okla. 1916) 159 Pac. 1187.

⁵Cases cited in footnote 4; *Walsh v. Dwight, supra*; *Grogan v. Chaffee* (1909) 156 Cal. 611, 105 Pac. 745; *Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041; *contra, Hill Co. v. Gray* (1910) 163 Mich. 12, 127 N. W. 803.

⁶*Fisher Flouring Mills Co. v. Swanson, supra*; *Stewart v. Rawleigh Med. Co., supra*; *Ingersol v. Hahne & Co.* (N. J. Eq. 1917) 101 Atl. 1030; *cf. Rawleigh Med. Co. v. Osborne* (Iowa 1916) 158 N. W. 566; *Munter v. Eastman Kodak Co.* (1915) 28 Cal. App. 660, 153 Pac. 737.

⁷*Bement & Sons v. National Harrow Co.* (1902) 186 U. S. 70, 22 Sup. Ct. 747; *Edison Phonograph Co. v. Pike* (C. C. 1902) 116 Fed. 863; *Victor Talking Machine Co. v. The Fair* (C. C. A. 1903) 123 Fed. 424; *National Phonograph Co. v. Schlegel* (C. C. A. 1904) 128 Fed. 733.

⁸*Dr. Miles Med. Co. v. Jaynes Drug Co.* (C. C. 1906) 149 Fed. 838.

"Contracts . . . concerning articles made under trade secrets, the same as similar contracts concerning articles made under a patent or a

other classes of goods did not come before the federal courts. This theory prevailed until the decision in *John D. Park & Sons Co. v. Hartman*⁹ when the court, being confronted with a formidable price fixing scheme, held that the trade secret or private formula did not render the manufacturer immune from the common law rule against monopolies and restraints of trade and decided that the rule had been violated in that case. In 1910 the question came before the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹⁰ The court, sustaining the Hartman case, said the monopoly of production gave no additional rights and that the extended system of contracts involved in the case under consideration amounted to an unreasonable restraint of trade both at common law and under the Sherman Act. Three years later, the court, relying on the *Dr. Miles Medical Co.* case as establishing that no right to fix the resale price existed in the case of a non-patented article,¹¹ held that the patent statute did not confer that right upon a patentee.¹² There was no contract involved in that case.¹³ The suit was for contributory infringement for disregarding the notice concerning the resale price. Yet, since then, the federal courts by a loose coordination of the two cases have held that any endeavor to fix the resale price of patented goods is invalid *per se* even though a contract is present.¹⁴

The recent case of *Boston Store of Chicago v. American Graphophone Co.* (No. 363, October Term, 1917, decided March 4th, 1918) not only affirms this doctrine but appears to have gone farther in

copyright, are outside the rule of restraint of trade whether at common law or under the federal statute." At pp. 841-842; *Dr. Miles Med. Co. v. Goldthwaite* (C. C. 1904) 133 Fed. 794; *Dr. Miles Med. Co. v. Platt* (C. C. 1906) 142 Fed. 606; *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174; *cf. Wells & Richardson Co. v. Abraham* (C. C. 1906) 146 Fed. 190, where the validity of the contract was conceded.

⁹(C. C. A. 1907) 153 Fed. 24.

¹⁰(1910) 220 U. S. 373, 31 Sup. Ct. 376.

¹¹The former case actually held that the system of contracts therein involved was an unreasonable restraint of trade and therefore each individual contract was invalid.

¹²*Bauer & Cie v. O'Donnell* (1913) 229 U. S. 1, 33 Sup. Ct. 616.

¹³Nor was there any contract in *Bobbs-Merrill Co. v. Straus* (1908) 210 U. S. 339, 28 Sup. Ct. 722, where the court held that the owner of a copyright could not impose the resale price by mere notice without any privity of contract by virtue of his statutory privilege.

¹⁴*Straus v. Victor Talking Machine Co.* (1917) 243 U. S. 490, 37 Sup. Ct. 412; *Ford Motor Co. v. Union, etc. Co.* (D. C. 1917) 244 Fed. 156. In the earlier case of *Bement & Sons v. National Harrow Co.*, *supra*, the Court, though dealing with a contract, placed its decision on the ground that the patentee had the right to fix the resale price by virtue of his patent. The Bauer case overruled that ground, but it did not determine the validity of such a contract. In the Straus case the Court was again confronted with an agreement and, by combining the *Dr. Miles* case with the Bauer case, refused to attach any binding force to it.

Before these latter cases, it should be noted, the doctrine of the *Dr. Miles* case had been made the basis of a suit in equity by the United States Government against a manufacturer for violation of the Sherman Act by an arrangement attempting to fix the resale price of cornflakes, *United States v. Kellogg etc. Co.* (D. C. 1915) 222 Fed. 725, and the doctrine of the Bauer case had been made the basis of a similar suit against a patentee for a similar arrangement. *United States v. Keystone, etc. Co.* (D. C. 1915) 218 Fed. 502.

holding that, assuming that jurisdiction did not attach by virtue of the question of the patent statute and viewing the matter as a mere contract action before the court by virtue of a diversity of citizenship, the contract was invalid under general law. This may be true, if we consider the contract as one of an extended series seeking to restrain trade. It should be noted that the Supreme Court has never dealt with a case in which a monopoly of production of the particular product was not involved. To permit the fixing of the resale price in such a case might be sanctioning the extension of the monopoly and it is this possibility that the court has endeavored to avoid.¹⁵ If the Court did not place its decision on the ground that there was an unreasonable attempt to extend a monopoly, then logically it would have to hold that a contract fixing the resale price of a single chattel in which the public was not at all concerned would be invalid. Yet the pivotal case of *Dr. Miles' Medical Co. v. John D. Park & Sons Co.* expressly distinguished such a case.¹⁶ It is probable that in dealing with instances of the restriction of resale prices that the Supreme Court has not intended to depart from "the rule of reason" enunciated in the *Standard Oil and Tobacco Co.* cases.¹⁷ The inferences to the contrary may be explained by the fact that the Court has been very strict in its view of what is unreasonable when it has been confronted by an extended series of contracts as was the situation in every case which came before it.

"SUBSTANTIVE" RIGHTS IN CONFLICT OF LAWS.—The familiar doctrine that in the determination of a case involving a conflict of laws the *lex fori* will govern in matters of procedure, and the *lex loci* substantive rights, is now well settled and undisputed.¹ But the application of the rule is by no means free from difficulty. That the ordinary proceedings of a trial should be in accordance with the law of the forum is reasonable enough and any other rule would do little else than cause confusion and inconvenience. Similarly it is to be expected that the law of the place should control in determining whether or not the cause of action exists. But these cases are never questioned and indeed seem never to have arisen. But there is a middle ground in which the cases present questions of considerable perplexity. "Many laws are

¹⁵It is difficult to see, however, why the monopoly of production of a particular article should be decisive of the question so long as the restraint is reasonable, especially when a monopoly in fact of the commodity does not exist. See the concurring opinion of Brandeis, J., in *Boston Store of Chicago v. American Graphophone Co.*, *supra*; "Price Maintenance", 7 *American Econ. Rev.* 28; "The Cream of Wheat Case", 31 *Pol. Sc. Quar.* 392.

¹⁶"Nor are we dealing with a single transaction, conceivably unrelated to the public interest." At p. 407.

¹⁷*Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632.

¹Dicey, *Conflict of Laws* (2nd ed.) 708; Westlake, *Private International Law* (5th ed.) § 341.

only apparently rules of procedure, but in truth are material laws".² To state the proposition more accurately many laws are both procedural and substantive³ and the problem is to determine which they shall be considered for the purposes of determining what law to apply. There are several very common instances. The Statute of Limitations is considered both in England and in this country as simply barring the remedy.⁴ But clearly the right itself is affected. The distinction between the effect on the right and the remedy may be important as an historical explanation but it cannot be denied that by barring the remedy the statute has most effectively denied the right. Yet the Statute of Limitations has been considered in cases involving a conflict of laws as purely procedural, and consequently the courts have applied the *lex fori*.⁵ With regard to presumptions, it is held that so-called conclusive presumptions, which are really not presumptions at all,⁶ are rules of substantive law,⁷ while true *prima facie* presumptions are procedural.⁸ Perhaps the most striking illustration of the distinction between matters of procedure and substantive rights arises in the case of the Statute of Frauds. The courts distinguish between the 4th section which provides that "no action shall be brought" and the 17th section which provides that the contract "shall be void". In the former case, it is held that the effect of the statute is a matter of procedure,⁹ while in the latter, the substantive right itself is barred.¹⁰

²von Bar, International Law (Gillespie trans.) 497. "Very many rules are only in appearance rules of procedure and really concern the legal relation itself." von Savigny, Private International Law (Guthrie trans., 2nd ed.) 146-147.

³The explanation seems clearly historical. "whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." Holmes, Common Law 253; "So great is the ascendancy of the law of action in the infancy of courts of justice, that substantive law has the look of being gradually secreted in the interstices of procedure, and the early lawyer can only see the law through the envelope of technical forms". Maine, Works 429.

⁴Higgins v. Scott (1831) 2 B. & Ad. 413; Michigan Ins. Bank v. Eldred (1889) 130 U. S. 693, 696; Currier v. Studley (1893) 159 Mass. 17, 25, 31 N. E. 709.

⁵Per Story, J., Leroy v. Crowninshield (1820) 15 Fed. Cas. No. 8,269; British Linen Co. v. Drummond (1830) 10 B. & C. 903; Miller v. Brenham (1877) 68 N. Y. 83; Dicey, *op. cit.*, 709, 710; Westlake, *op. cit.*, § 238; Huber v. Steiner (1835) 2 Bing. (N. c.) 202.

⁶2 Chamberlayne, Evidence § 1087.

⁷Hartman v. Louisville & N. Ry. (1889) 39 Mo. App. 88; Valk v. Erie R. R. (1909) 130 App. Div. 446, 114 N. Y. Supp. 964; Waxelbaum v. Southern Ry. (1912) 168 Ill. App. 66; Koster v. Merritt (1864) 32 Conn. 246.

⁸Smith v. Wabash Ry. (1895) 141 Ind. 92, 40 N. E. 270; Pennsylvania Co. v. McCann (1896) 54 Oh. St. 10, 42 N. E. 768; Helton v. Alabama Ry. (1893) 92 Ala. 275, 12 So. 276; Jones v. Chicago R. R. (1900) 80 Minn. 488, 83 N. W. 446; Southern Ry. v. Robertson (1909) 7 Ga. App. 154, 66 S. E. 535.

⁹Leroux v. Brown (1852) 12 C. B. 801; Kleeman v. Collins (1872) 72 Ky. 460; Third Nat'l. Bank of N. Y. v. Steele (1902) 129 Mich. 434; 88 N. W. 1050.

¹⁰Marie v. Garrison (N. Y. 1883) 13 Abb. N. C. 210; *cf.* Westlake, *op. cit.*, § 208.

These illustrations serve to show the extent to which the courts have gone in their distinction. They seem to have applied as the test the classification of rights into substantive and procedural without realizing that the difference between the two is by no means an absolute one.¹¹ The terms procedure and substantive are words of art which serve a useful purpose in affording a convenient method of grouping. But the distinction is artificial and based on a difference of degree. It has been the view, however, that ample concessions were made to the *lex loci* since it could not be expected that in trying a case the forum should take over an entirely new procedure.¹² This seems a very narrow view. Since the distinction which has been made is not one necessary from the nature of things, it is submitted that the *lex loci* should be applied in those classes of cases where the result is so materially affected by the difference in the rule as to outweigh the inconvenience if any in departing from the procedural law of the forum. Where the rule of the *lex loci* is a familiar one there is greater reason for applying it.¹³ The only limitation on the rule should be one of policy,¹⁴ for the forum cannot be expected to apply rules of law, however important to the litigants, which are contrary to the spirit of its own laws.

This more liberal attitude seems to prevail on the continent¹⁵ and it may be explained by their system of jurisprudence which considers law not as territorial but personal.¹⁶ Whatever may be its explanation, it is to be hoped that the attitude may be adopted, and some recent decisions in this country are most encouraging. The recent case of *Barnet v. New York Central, etc. R. R.* (1918) 222 N. Y. 195, 18 N. E. 625, it was held in accordance with controlling authorities in the United States Supreme Court¹⁷ that for the purposes of determining

¹¹"The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. * * * While it may be convenient to distinguish between the right or liability, and the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy is applied to the right, on the other, i. e., between substantive law and procedural law, it should not be forgotten that so far as either is law at all it is the litigant's right to insist upon it, i. e., it is part of his right. In other words, it is substantive law." Chamberlayne, *op. cit.*, § 171.

¹²Dicey, *op. cit.*, 709; Westlake, *op. cit.*, § 341.

¹³See 17 Columbia Law Rev. 633.

¹⁴Westlake, *op. cit.*, 296.

¹⁵von Savigny, *op. cit.*, 145; Lorenzen, Cases on Conflict of Laws, 84n.

¹⁶For an excellent discussion of some phases of this fundamental difference between the French and the Common Law, see Pillet, "Jurisdiction in Actions Between Foreigners." 18 Harvard Law Rev. 325.

¹⁷*Central Vermont Ry. v. White* (1915) 238 U. S. 507, 35 Sup. Ct. 865; *Southern Ry. v. Prescott* (1916) 240 U. S. 632, 36 Sup. Ct. 469. The former case arose under the Federal Employers' Liability Act. By the law of Vermont, the burden of proving freedom from contributory negligence was on the plaintiff, while in the federal courts, the burden of proving contributory negligence was on the defendant. Though the action was commenced in Vermont, the federal law governed all matters of substantive rights, and on appeal the United States Supreme Court held that the question of the burden of proof was of the very substance of the litigant's rights, and therefore it upheld the trial court in applying the federal law.

which party had the burden of proving contributory negligence with regard to an injury to an interstate freight shipment, that the burden of proof be considered a matter of substantive law.¹⁸ In this case there was no evidence at all of contributory negligence, so that the determination of which party was under the burden of establishing it was of first importance to the decision. There seems little question that in the ordinary classification burden of proof is a matter of procedure. But it seems equally clear that in such a case as the court had before it, a substantial if not a substantive right was affected. Since, whoever has the burden of proof, the trial in the forum would not be inconvenienced, and since, clearly, no question of policy is involved, the Supreme Court rule seems indeed salutary, and it is to be hoped that even if the courts continue, in similar cases, to refer to "procedural" and "substantive" rights, they will not harass themselves with distinctions which have as their sole justification their convenience for other purposes.

THE EFFECT OF A CORPORATE MERGER UPON A CONTRACT OF SPECIAL GUARANTY.—Since originally, a contract of guaranty was usually entered into merely as an accommodation, and consequently resulted in no personal benefit to the guarantor, the law came to look upon a guarantor as a favorite and refused to subject him to liability except upon the strict terms of his undertaking. Consequently, when a contract of guaranty is entered into with a particularly named party, in the absence of some indication of an intention to make it assignable it will not be extended to any other party than the one named therein.¹ Accordingly it was held that a principal could not avail himself of a guaranty made with an agent, where the guaranty did not show that the agent was acting for an undisclosed principal.² Likewise, when a guaranty is given to a partnership, any change in the firm, will defeat the claim for any default subsequent to such change.³ There

¹⁸This case, involving an injury to an interstate shipment, arose under the Carmack Amendment so that the federal substantive law controlled, though the action was brought in a state court. The rule of the federal courts was that for the purposes of conflict of laws, burden of proof was a matter of substance, *supra*, footnote 17, and the state court, bound by the federal rule, applied the federal rule that the burden of proof was on the shipper.

¹Lamm & Co. v. Colcord (1908) 22 Okla. 493, 98 Pac. 355; Lyon & Co. v. Plum (1908) 75 N. J. L. 883, 69 Atl. 209; 1 Brandt, Suretyship (3rd ed.) § 106; Stearns, Suretyship (2nd ed.) § 2; see 17 Columbia Law Rev. 561.

²Barns v. Barrow (1874) 61 N. Y. 39; see Nat'l Bank of Peoria v. Diefendorf (1878) 90 Ill. 396.

³Strange v. Lee (1803) 3 East 484; Spiers v. Houston (1829) 4 Bligh (N. S.) 515; Bennett v. Draper (1893) 139 N. Y. 266, 34 N. E. 791; Chapman v. Beckinton (1842) 3 Q. B. 703; 2 Bates, Partnership, § 649. However, a guaranty given to a corporation can be enforced by a receiver, Philadelphia etc. Co. v. Daube (C. C. 1896) 71 Fed. 583, since the effect of the appointment of a receiver is to transfer the custody of the assets and rights of the corporation into the hands of the court and does not accomplish a change of title. Chicago Union Bank v. Kansas City Bank (1890) 136 U. S. 223, 236, 10 Sup. Ct. 1013.

is sound reasoning that sustains these holdings. Well may the guarantor claim that he had reposed great faith and trust in the agent and had relied upon his discretion in the managing of accounts and promptness of collections, or that he is wholly unfamiliar with the business methods of the agent's principal and would never have become surety had he known that the contract was not with the agent. Similarly, where there is a change in a partnership by the withdrawal of a member, the guarantor may have relied upon the supervisory control exercised by the retiring member as an inducement for his contract, or where a new member enters the firm, the wealth and influence of this new member may be such as to dominate the entire policy of the partnership, and thereby jeopardize the guarantor's interest.⁴ Even where the new organization is composed of the same members as the original firm, advances made by the former will not be binding on the guarantor,⁵ since any deviation from his contract would be subjecting him to a liability that he had not assumed.⁶ But where the change is merely in the name and not in identity, although that has been held sufficient to discharge the guarantor,⁷ a different conclusion seems more reasonable. Thus, where the guaranty obligee was slightly

⁴*Lyon & Co. v. Plum, supra*; 1 Brandt, *op. cit.* § 438. In *Weston v. Barton* (1812) 4 Taunt *673, at *682 the court *per Mansfield, C. J.*, said, "it is very probable that sureties may be induced to enter into such a security, by a confidence which they repose in the integrity, diligence, and caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be, that the partner dying, or going out, may be the very person on whom the sureties relied;". However, when a guaranty is given to a firm as a firm, any change will not alter the surety's obligation. *Pease v. Hirst* (1829) 10 Barn. & C. 122.

⁵*Taylor & Co. v. McClung's Ex'r.* (1858) 7 Del. 24. The liability of a guarantor does not extend to a member of a firm who has made advances after succeeding to the firm, *Schoonover v. Osborne* (1899) 108 Iowa 453, 79 N. W. 263, nor will a guaranty given to an individual be extended so as to cover the liability of a firm of which the individual subsequently becomes a member. *Coan v. Patridge* (Sup. Ct. 1906) 98 N. Y. Supp. 570; *Holmes v. Small* (1892) 157 Mass. 221, 32 N. E. 3.

⁶*Board of County Comm'rs. v. Greenleaf* (1900) 80 Minn. 242, 83 N. W. 157; *Appleton v. Parker* (1860) 81 Mass. 173; *Strange v. Lee, supra*. Some cases go so far as to say that if the change is even for the guarantor's benefit, yet he will be discharged. See *Miller v. Stewart* (1824) 22 U. S. 680; *United States v. Lynch* (D. C. 1912) 192 Fed. 364, 368; *Ver Nooy v. Pitner* (1915) 17 Ga. App. 229, 86 S. E. 456; 16 *Columbia Law Rev.* 79; 1 Brandt, *op. cit.* § 427, though it seems more reasonable to refuse to do so, where the change is in its nature beneficial to the surety, or if it is obvious that he cannot be prejudiced by it. See *Ullman Realty Co. v. Hollander* (1910) 66 Misc. 348, 123 N. Y. Supp. 772; *Cambridge Savings Bank v. Hyde* (1881) 131 Mass. 77, 79.

⁷*Grant v. Naylor* (1808) 8 U. S. 224. In *Crane Co. v. Specht* (1894) 39 Neb. 123, at p. 135, 57 N. W. 1015, the court said, "nor do I think that evidence could be received to show that the Crane Company had the same officers, and was, under the same management, engaged in the same business and in the same location as the Crane Bros. Manufacturing Company, or that it had the same stockholders and merely changed its name, or, if received, that it would alter or affect in any manner the relations or rights of the parties to the action."

misdescribed,⁸ or though identified was incorrectly named,⁹ the guaranty was enforced in accordance with the intention of the parties.¹⁰

In considering who can take advantage of a contract of guaranty, a distinction must be made between a special and general guaranty. A special guaranty is one which runs only to certain definitely named persons,¹¹ while a general guaranty is addressed to any and every person who, relying upon the guarantor's promise, extends credit to the latter's principal.¹² A general guaranty is, by its nature, indefinite in its scope;¹³ but a special guaranty, in the absence of an express intention to the contrary, may be taken advantage of only by the party to whom it is extended.¹⁴

In the recent case, *W. H. McElwain Co. v. Primavera* (Sup. Ct. App. Div. 1st Dept. 1917), 167 N. Y. Supp. 815, a special guaranty had been given by the defendant to a corporation, which subsequently became merged into the plaintiff corporation. The section of the corporation law under which the merger took place,¹⁵ provides that the new corporation "shall acquire and become, and be possessed of all the rights, estate, property, privileges and franchises of such other corporation". The question arose whether the new corporation, after having made advances to the defendant's principal, would be entitled to take advantage of the contract of guaranty. The court held, one judge dissenting, that the guaranty inured to the benefit of the new corporation.

⁸Malleable Iron Range Co. v. Pusey (1910) 244 Ill. 184, 91 N. E. 51.

⁹Knit Goods Exchange Inc. v. Halpern (1913) 81 Misc. 218, 142 N. Y. Supp. 566.

¹⁰In determining the obligation of the contract, courts will construe the agreement most strictly in favor of the guarantor. See footnote 1, *supra*. Some courts, moreover, hold that in ascertaining the intention of the parties the agreement should be construed in favor of the guarantor. *Nicholson v. Paget* (1832) 1 C. R. & M. *48, while others, that it should be construed most strongly against the guarantor. *Lamm & Co. v. Colcord, supra*; *Drummond v. Prestman* (1827) 25 U. S. 515; *Mason v. Pritchard* (1810) 12 East 227. By the weight of authority the contract is treated in the same manner as any other contract, that is, in accordance with the apparent intent and understanding of the parties as obtained from the context when read in the light of the surrounding circumstances. *Bridgeport Malleable Iron Co. v. Iowa Cutlery Works* (1906) 130 Iowa 736, 107 N. W. 937; *Delaware County Nat'l. Bank v. King* (1905) 47 Misc. 447, 95 N. Y. Supp. 954; *Beers v. Wolf* (1893) 116 Mo. 179, 22 S. W. 620; 1 Brandt, *op. cit.* § 103; *cf. Panta Gorda Bank v. State Bank of Ft. Meade* (1907) 52 Fla. 399, 42 So. 846. But if the guarantor is a corporation, engaged in the business of guarantying accounts, a construction most strongly against it is applied. *United States v. Lynch, supra*; *Young v. American Bonding Co.* (1910) 228 Pa. 373, 77 Atl. 623.

¹¹See footnote 1, *supra*.

¹²1 Brandt, *op. cit.* § 132. The guarantor's liability ceases a reasonable time after giving notice. *Ricketson v. Lizotte* (1916) 90 Vt. 386, 98 Atl. 801; 1 Brandt, *op. cit.* § 153.

¹³*Stearns, op. cit.* § 51; see *Evansville Nat'l. Bank v. Kaufman* (1883) 93 N. Y. 273, 277; *Pease v. Hirst, supra*.

¹⁴A special guaranty cannot be in any way extended by implication. 1 Brandt, *op. cit.* § 106. In *Miller v. Stewart, supra*, at p. 702, the court while speaking through Story, J., said, "Nothing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract."

¹⁵N. Y. Stock Corp. Law, § 15; Consol. Laws (1909) c. 59.

Since it has been held that a guaranty running to an unincorporated body will be discharged by a subsequent incorporation of that body,¹⁶ and that, the incorporation of a partnership will accomplish the same result, even though the personnel of the organization remains the same,¹⁷ indeed, since any material change in the status or composition of the party originally assured will discharge the guarantor,¹⁸ it would seem to follow, logically, that the merger of one corporation into another would also release him.

To say, as it was said, in a case which reached the same conclusion¹⁹ as the instant case, that a guarantor has constructive notice of the laws permitting the merger of corporations and, therefore, contracted with knowledge that his guaranty may be transferred to the surviving corporation, is, in effect, presuming the entire issue. To say, as it was said, in the instant case that a merger does not amount to a material change in the status of a corporation, but results only in the loss of identity so far as separate existence is concerned—the merged corporation becoming an integral part of the surviving corporation—is to play on words. The statute, in the instant case, speaks of a “new corporation”. A merger actually establishes a new corporation. Therefore, in the absence of an intention to make this guaranty assignable, the said “new corporation” should not have been allowed to take advantage of it.

¹⁶*Dance v. Gridler* (1804) 1 Bos. & Pul. (N. S.) 34.

¹⁷*Saunders Co. v. Ducker* (1911) 116 Md. 474, 82 Atl. 154; *Jordan Marsh Co. v. Beals* (1909) 201 Mass. 163, 87 N. E. 471; *cf. Lloyd's v. Harper* (1880) 16 Ch. Div. 290; but *cf. Knit Goods Exchange Inc. v. Halpern, supra*, where the firm, a partnership, had become a corporation three days before, and the guarantor had no knowledge of that fact.

¹⁸*Lyon & Co. v. Plum, supra*; *Spiers v. Houston, supra*. But where there is a change from a state bank to a national bank, *City Nat'l. Bank of Poughkeepsie v. Phelps* (1884) 97 N. Y. 44, or a national bank to a state bank, *First Commercial Bank v. Talbert* (1895) 103 Mich. 625, 61 N. W. 888; *cf. People v. Backus* (1889) 117 N. Y. 196, 22 N. E. 759; see *Bank of Long Island v. Young* (1905) 101 App. Div. 88, 91 N. Y. Supp. 849, it has been held that the guarantor is not discharged. This seems to be an anomaly in the law of guaranty and without basis in principle. The theory of such holdings is, that the national bank is the same in identity as the state bank, only doing business under a different jurisdiction.

¹⁹*Springfield Lighting Co. v. Hobart* (1902) 98 Mo. App. 227, 68 S. W. 942; see *Bank of Long Island v. Young, supra*.

RECENT DECISIONS.

FRANCIS GOERTNER, *Editor-in-Charge.*

ALIEN ENEMY—RIGHT OF CITIZEN OF BELLIGERENT STATE TO SUE IN ITS COURTS ON BEHALF OF NON-RESIDENT ALIEN ENEMIES.—The plaintiffs, non-resident alien enemies, assign their cause of action to trustees, American citizens, for the benefit of creditors, of whom two are American banks, retaining, however, the right to supervise the disposition of moneys received. Upon defendant's motion to dismiss the suit, the plaintiffs request that their assignees be substituted as parties plaintiff. *Held*, since the result of a successful suit would enrich non-resident alien enemies, the action is suspended for the duration of the war. *Rothbarth v. Herzfeld* (1917) 179 App. Div. 865, 167 N. Y. Supp. 199.

When a non-resident alien enemy brings an action in the courts of this country the suit will generally be suspended, pending the termination of the war, *Plettenberg, Holthaus & Co. v. Kalmon & Co.* (D. C. 1917) 241 Fed. 605; 7 Moore, Digest of Int. Law § 1139; see *Speidel v. Barstow Co.* (D. C. 1917) 243 Fed. 621; 16 Columbia Law Rev. 525, even though citizens of the state in which the suit is brought have an interest in such suit. *Candilis & Sons v. Victor & Co.* (1916) 33 T. L. R. 20. The reasons for casting this disability upon the non-resident alien enemy is to prevent intercourse with the enemy, *Tingley v. Müller* [1917] 2 Ch. 144, 160; see *Williams v. Paine* (1897) 169 U. S. 55, 70, 18 Sup. Ct. 279, so that valuable military information, see 31 Law Q. Rev. 30, or financial aid may not reach him. *Plettenberg, Holthaus & Co. v. Kalmon & Co.*, *supra*. This latter possibility has now been removed by the passage of the Trading with the Enemy Act, October 16, 1917, providing for the appointment of a custodian of alien enemy property and for the disposition of a money judgment through a proper court order. See *In re Kelly* (1917) 101 Misc. 495, 167 N. Y. Supp. 256. The only reason, therefore, for the disability to-day is the necessity for communication, and on this ground alone can the decision in the instant case be sustained. Cases where a resident representative of an enemy alien has not been permitted to sue, *Brandon v. Nesbitt* (1794) 6 Durn. & E. 23; *Dangler v. Hollinger Gold Mines Ltd.* (1915) 34 Ont. L. R. 78, may be explained on the ground that such actions involved communication with the non-resident enemy or made possible his financial enrichment. *Cf. Daimler Co. Ltd. v. Continental Tyre & Rubber Co.* (1916) 114 L. T. R. (N. S.), 1049. It would seem, however, that no hard and fast rule can be laid down, but the court within its sound discretion must determine whether under a given state of facts a recovery may be allowed without jeopardizing the public interest. See *Speyer Bros v. Rodriques* (1917) 117 L. T. R. (N. S.) 775.

CARRIERS—INTERSTATE COMMERCE—INITIAL CARRIER'S LIABILITY UNDER THE CARMACK AMENDMENT.—The plaintiff shipped goods with the defendant carrier consigned to a destination outside of the state. The terminal carrier, after holding the goods for a reasonable length of time, deposited them in a warehouse where they were subsequently lost. In an action against the initial carrier under the Carmack

Amendment, 34 Stat. 595, 8 U. S. Comp. Stat. (1916) § 8604a, *held*, the defendant was not liable. *Adams Seed Co. v. Chicago Great Western R. R.* (Iowa 1917) 165 N. W. 367.

A carrier's contract consists of the duty to carry and deliver property deposited with it for transportation, and while the carrier is so engaged the common law imposes upon it the strict liability of a common carrier. Where, however, such duty terminates the liability ends with it. *Rustad v. Great Northern Ry.* (1913) 122 Minn. 453, 142 N. W. 727. The majority view in this country does not consider the relationship of a carrier at an end until notice has been given to the consignee that the merchandise has arrived at its destination, and a reasonable time within which to remove it has elapsed. *Faulkner v. Hart* (1880) 82 N. Y. 413; *Walters v. Detroit United Ry.* (1905) 139 Mich. 303, 102 N. W. 745. Thereafter the railroad company holds the goods in the capacity of a warehouseman, with the obligations of an ordinary bailee for hire. *Rustad v. Great Northern Ry.*, *supra*. The Carmack Amendment, by giving a shipper a remedy against the initial carrier, in effect constitutes the connecting carriers its agents, *Galveston, etc. R. R. v. Wallace* (1912) 223 U. S. 481, 32 Sup. Ct. 205; *Burkenroad Goldsmith Co. v. Illinois Cent. R. R.* (1915) 138 La. 81, 70 So. 44, and the result is just as though all the intermediate lines were owned by the first railroad. The liability of the initial carrier in regard to delivery is therefore to be tested by the liability of the final carrier. Since the loss in the instant case occurred when the terminal carrier was no longer acting in the capacity of a carrier of freight, the court properly held that the first carrier was not liable. *Louisville, etc. R. R. v. Brewer* (1913) 183 Ala. 172, 62 So. 698; *Hogan Milling Co. v. Union Pac. R. R.* (1914) 91 Kan. 783, 139 Pac. 397; *Dodge & Dent Mfg. Co. v. Pennsylvania R. R.* (1916) 175 App. Div. 823, 162 N. Y. Supp. 549. Furthermore, since the purpose of the statute is to relieve the shipper from the onerous burden of proving the negligence of a particular connecting carrier, while the goods are in transit, see *Atlantic, etc. R. R. v. Riverside Mills* (1911) 219 U. S. 186, 199, 31 Sup. Ct. 164, 167, the reason for applying the rule does not exist where the goods have already reached their terminus.

CIVIL RIGHTS—PLACES OF PUBLIC ACCOMMODATION—OF REFRESHMENT—OF AMUSEMENT.—Plaintiff, a negro, was refused service in a saloon and sued for the statutory penalty under the Civil Rights Law. N. Y. Civil Rights Law § 40, Laws of 1913 ch. 265. *Held*, a saloon is not a place of public accommodation within the act. *Gibbs v. Arras Bros.* (N. Y. Ct. of App. 1918) 58 N. Y. L. J. 95. On similar facts, *held*, that a dancing pavilion maintained by a railroad in connection with its business as carrier was a place of public accommodation. *Johnson v. Syracuse, etc. R. R.* (N. Y. Ct. of App. 1918) 58 N. Y. L. J. 122.

Civil rights laws usually contain a list of contemplated places and businesses plus a descriptive phrase of general nature. The principles of construction adopted are that such general clauses are limited in their interpretation to cases of the same *genus* as those specifically mentioned; *Civil v. Green* (1896) 161 Ill. 265, 43 N. E. 1105; *Rhone v. Loomis* (1898) 74 Minn. 200, 77 N. W. 31; and that, since such laws are usually penal, they are to be construed strictly with respect to cases not included in the enumeration. *Burks v. Bosso* (1905) 180 N. Y. 341, 73 N. E. 58. The general phrases usually presented for construction are: (1) "other places of public accommodation", which has

been held not to include a bootblack stand, *Burks v. Bosso, supra*, a drug store with a soda fountain, *Cicil v. Green, supra*, a cemetery, *People v. Forest, etc. Co.* (1913) 258 Ill. 36, 101 N. E. 219, a family hotel, *Alsberg v. Lucerne, etc. Co.* (1905) 46 Misc. 617, 92 N. Y. Supp. 851, or a saloon *Kelar v. Koerber* (1899) 61 Oh. St. 388, 55 N. E. 1002; (2) "other public places where refreshments are served" which has been held not to include saloons, *Rhone v. Loomis, supra*, free booths at pure food shows, *Brown v. Bell Co.* (1909) 146 Iowa 89, 123 N. W. 231, or private boarding houses, see *Humburd v. Crawford* (1905) 128 Iowa 743, 105 N. W. 330; (3) "other public places of recreation and amusement" within which skating rinks, *People v. King* (1888) 110 N. Y. 418, 18 N. E. 245; see *Jones v. Broadway Co.* (1908) 136 Wis. 595, 118 N. W. 170, and bowling alleys (part of a pleasure resort), *Johnson v. Humphrey, etc. Co.* (1902) 24 Ohio C. C. 135, have been held to fall. If the general phrase appears without a list of specific places, the courts construe as public places only those places impressed with a public interest at common law, *Faulkner v. Solazzi* (1907) 79 Conn. 541, 65 Atl. 947, or places operated under a privilege or franchise. *Commonwealth v. Sylvester* (1866) 95 Mass. 247; *Bowlin v. Lyon* (1885) 67 Iowa 536, 25 N. W. 766.

CONSPIRACY—FRAUDULENT TRANSFER—TORT LIABILITY OF FRAUDULENT TRANSFEREE.—The plaintiff brought a tort action against the defendant, who had received property in pursuance of a fraudulent conspiracy to defeat the plaintiff. *Held*, that the conspiracy being in regard to a particular debt, the plaintiff could recover. *Schwenn v. Schwenn* (Wis. 1918) 166 N. W. 171.

The weight of authority is that an unsecured general creditor cannot maintain an action against third persons conspiring with the debtor fraudulently to dispose of the debtor's property. *Security State Bank v. Reger* (Okla. 1915) 151 Pac. 1170; *Field v. Siegel* (1898) 99 Wis. 605, 75 N. W. 397; *Adler v. Fenton* (1860) 65 U. S. 407; see Bump, *Fraudulent Conveyances* (4th ed.) § 528; but see *Hopkins v. Beebe* (1856) 26 Pa. 85. Since such a creditor has no lien upon or interest in the property of his debtor, *Hurwitz v. Hurwitz* (1894) 10 Misc. 353, 31 N. Y. Supp. 25; *Austin v. Barrows* (1874) 41 Conn. 287, he has lost only a possibility of realization, *Moody v. Burton* (1847) 27 Me. 427, *Le Gierse v. Kellum* (1886) 66 Tex. 242; Bump, *op. cit.* § 528, and this injury is too remote and speculative. *Klous v. Hennessey* (1881) 13 R. I. 332, see *Lamb v. Stone* (1831) 28 Mass. 527; *Wellington v. Small* (1849) 57 Mass. 145. Nor can the creditor be said to be damaged in law, for he still has his debt, see *Moody v. Burton, supra*, and has open to him the privilege of securing judgment and then enforcing any of the remedies of the judgment creditor. *Hall v. Eaton* (1853) 25 Vt. 458; *Lamb v. Stone, supra*; see *Moody v. Burton, supra*. The result of allowing such actions would be to subject the fraudulent transferee to liability for all the debts of his transferor, however large the debts, and however small the value of the property transferred, for the action would be equally available to every creditor. See *Moody v. Burton, supra*; *Lamb v. Stone, supra*. The court in the principal case recognized the general rule, but made an exception on the ground that here the fraud was in regard to a particular contract. This distinction is justified neither in principle nor on authority. It leads to the absurdity that a conspiracy to defeat a single creditor is more objectionable than one to defeat the entire body of creditors.

CONTEMPT—PETITION FOR RECALL OF JUDGE. The defendant circulated a petition for the recall of a judge and, in a statement of the grounds for the proposed recall, as required by the state constitution, alleged judicial misconduct relative to a pending trial. *Held*, in view of the constitutional provisions as to the recall of officers, the statement in the petition was privileged and the defendant was not guilty of contempt. *Marians v. People ex rel Hines* (Colo. 1917) 169 Pac. 155.

A court possesses the power to commit for contempt, according to the American view, in order, that it may prevent interference with the administration of justice. 5 Columbia Law Rev. 249. A publication of matter reflecting upon the conduct of a pending cause is held to interfere with the course of justice and to be a "constructive" contempt. *State v. Hipple Printing Co.* (1915) 36 S. D. 210, 154 N. W. 292; *People ex rel. Connor v. Stapleton* (1893) 18 Colo. 568, 33 Pac. 167. The courts have been inclined, however, to restrict their common law power to commit for "constructive" contempt. For example, at common law an unfavorable criticism of the conduct of any trial, past or pending, was contempt, but it is now generally held in the United States that the criticism must relate to a pending cause. *Rapalje*, Contempt 56; 5 Columbia Law Rev. 249. In certain instances they have made further restrictions on their power to commit for contempt so as to not interfere with other policies of the law. *Cf. State v. Circuit Ct.* (1897) 97 Wis. 1, 72 N. W. 193. Thus a lawyer is not guilty of contempt in charging the presiding judge with misconduct, in an application for a change of venue, *In re Smith* (1913) 54 Colo. 486, 131 Pac. 277; *cf. Ex parte Curtis* (1859) 3 Minn. 274, and it was once held that an unfavorable criticism of the merits of a pending prosecution was not contempt if made wholly for the purpose of preventing the re-election of the governor who had instituted the prosecution. *People v. Few* (N. Y. 1807) 2 Johns. *290. Many conflicting decisions have arisen as to the power of a legislature to deprive the courts of their power to commit for "constructive" contempt, 4 Columbia Law Rev. 65, but it would seem to be unquestioned that a state constitution can deprive them of that power. *Cf. Ex parte Hickey* (1844) 12 Miss. 751. Since neither truth, *Globe Newspaper Co. v. Commonwealth* (1905) 188 Mass. 449, 74 N. E. 682; *Hughes v. Territory* (1906) 10 Ariz. 119, 85 Pac. 1058, nor the absence of willful intent, *In re Independent Pub. Co.* (D. C. 1915) 228 Fed. 787; *People v. Freer* (N. Y. 1804) 1 Caines 518, would ordinarily be a defense to contempt proceedings, it would seem that the provisions of the Colorado constitution requiring that the petitioner for the recall of a judge state the grounds of the proposed recall, could not be made effective unless the petitioner be protected against punishment for "constructive" contempt.

CONTRACTS—APPARENT MISTAKE IN OFFER BY TELEGRAPH.—The defendant delivered to a telegraph company an offer to sell a carload of potatoes at \$1.35 per bushel. Through a mistake in transmission the order as delivered to the plaintiff read 35 cents per bushel. The plaintiff accepted at once by telegraph. The potatoes were shipped by a bill of lading to the shipper's order with a draft attached for the price at \$1.35 per bushel. On presentation the plaintiff refused to pay the draft and later tendered the amount at 35 cents per bushel. Delivery of the goods being refused, he sued the carrier and the offeror in replevin. *Held*, since the telegraph company was the agent of the offeror title passed on the tender of the contract price, and

replevin would lie. *J. L. Price Brokerage Co. v. Chicago, etc. R. R.* (Mo. App. 1917) 199 S. W. 732.

Some American jurisdictions hold that the telegraph company is the agent of the offeror and that he is bound by mistakes in transmission. *Western Union Tel. Co. v. Flint River Lumber Co.* (1902) 114 Ga. 576, 40 S. E. 815. Other American jurisdictions follow the English rule that the telegraph company is not the agent of the offeror so as to bind him by mistakes in transmission, but is an independent contractor. *Henkel v. Pape* (1870) L. R. 6 Ex. 7; *Mount Gilead Cotton Oil Co. v. Western Union Tel. Co.* (N. C. 1916) 89 S. E. 21; see *Pepper v. Western Union Tel. Co.* (1889) 86 Tenn. 554, 11 S. W. 783. On principle, the latter view seems correct. 16 Columbia Law Rev. 617. Even on the assumption that the telegraph company is the agent of the offeror it is difficult to sustain the principal case. A party cannot accept an offer which he knows is a mistake, *Mummenhoff v. Randall* (1898) 19 Ind. App. 44, 49 N. E. 40, or which, in view of all the circumstances, he has good reason to believe is a mistake. *Harran v. Foley* (1885) 62 Wis. 584, 22 N. W. 837; see *Central R. R. of Ga. v. Gortatowsky* (1905) 123 Ga. 366, 51 S. W. 469. So if the mistake is apparent upon the face of the telegram or known to the receiver, he cannot hold the sender bound by its terms. *Germain Fruit Co. v. Western Union Tel. Co.* (1902) 137 Cal. 598, 70 Pac. 658; see *Central R. R. of Ga. v. Gortatowsky, supra*. With the market price approximating \$1.35 per bushel, it would seem that it was apparent to the offeree, a brokerage firm, that the offer to sell at 35 cents per bushel was a mistake. Cf. *Mummenhoff v. Randall, supra*. Hence, no contract resulted and the tender of the price did not pass title. Cf. *Harran v. Foley, supra*.

EASEMENTS—ERECTION OF A SINGLE BUILDING BY A COMMON TENANT OF TWO ADJOINING LANDOWNERS.—A and B, owners of adjoining private dwellings, each separately leased to the same tenant, to whom each gave permission so to alter the buildings as to make a single building to be used as a hotel. When these leases terminated and more than twenty years before the present controversy, the landowners again separately leased to another single tenant. Subsequent leases to other single tenants were made without any agreement between the landlords. B, the defendant, now wishes to separate the building by putting up a partition wall. In an action to enjoin this proceeding, *held*, there was no easement of user in common, and the defendant could separate his portion. *Olin v. Kingsbury* (App. Div. 1st Dept.) 168 N. Y. Supp. 766.

The acquisition of easements by prescription depends upon an exercise of the right to a user by the owner of the dominant tenement, acquiesced in by the owner of the servient tenement, for a period which would give a right by adverse possession to realty. *Dalton v. Angus* (1881) 6 App. Cas. 740; Washburn, *Easements and Servitudes* (3rd ed.) 114. Moreover, the fact that such user was originally permissive, would not prevent the easement from arising, if there was a subsequent revocation and a claiming adversely known to the owner of the servient tenement. *Eckerson v. Crippen* (1888) 110 N. Y. 585, 18 N. E. 443; *Toney v. Knapp* (1906) 142 Mich. 652, 106 N. W. 552. Assuming, therefore, that in the principal case the right of user by one part of the house over the other part of the house began by permission such permission may be said to have terminated with the

original tenancy; and a subsequent lease by each owner individually to another common tenant was a lease of his respective portion of the house plus the rights of user over the other part, thus constituting a sufficient claim of right and notice. *Cf. Eckerson v. Crippen, supra*. The facts of the instant case would seem to justify the creation of easements on the further ground, that, since the parol permission to the common tenant to construct a single building over the two lots was in effect the parol grant of easements of heating, access, etc., each owner would be estopped as against the other to deny the rights thus acquired after extensive improvements and alterations had been made. *Cf. Flickinger v. Shaw* (1890) 87 Cal. 126, 25 Pac. 268; see *Sanford v. Kern* (1909) 223 Mo. 616, 122 S. W. 1051. Furthermore, it has been held, on the analogy of the cases relating to the severance by the grantor of part of his tenement, that facts similar to those in the principal case would give rise to easements by implication. *Doe v. Morrell* (N. H. 1809) Smith 255; *Fronckowiak v. Platek* (1912) 152 App. Div. 301, 136 N. Y. Supp. 522; see *Foote v. Yarlott* (1908) 238 Ill. 54, 87 N. E. 62. The problem in the instant case is to deduce adverse user, estoppel, or an easement by implication, from facts which give no inexorable indication one way or the other. The injustice of enjoining absolutely the separation of the tenements, and thus making the parties tenants in common against their will, perhaps induced the court to refuse to recognize any easement. But this difficulty might have been obviated by granting the injunction subject to be dissolved on payment by the defendant for the improvements necessary to make the plaintiff's portion of the house relatively convenient as a separate dwelling. *Cf. Collins v. Buffalo Furnace Co.* (1902) 73 App. Div. 22, 76 N. Y. Supp. 420.

EMINENT DOMAIN—CONFIRMATION OF AWARD—SUBSEQUENT ABANDONMENT OF CONDEMNATION.—After an award of damages had been made and confirmed in condemnation proceedings instituted by the plaintiff water company to procure the defendant's land for its site, the plaintiff sought to abandon the proceedings. In an action by the plaintiff to enjoin the issuing of a distress warrant for the award, *held*, the property owner acquired a vested interest in the award. *York Shore Water Co. v. Card* (Me. 1917) 102 Atl. 321.

It is generally asserted that in the absence of statutory provisions eminent domain proceedings may be abandoned at any time before the rights of the parties have become mutually fixed. See *Matter of Rhinebeck & Conn. R. R.* (1876) 67 N. Y. 242; *St. Louis, etc. R. R. v. Cape, etc. R. R.* (1907) 126 Mo. App. 272, 102 S. W. 1042; *Nixon v. Marr* (C. C. A. 1911) 190 Fed. 913. But there is a diversity of opinion as to the stage of the proceedings at which the rights of the parties become reciprocally vested. The weight of authority seems to be that the condemnor may abandon the proceedings at any time before the payment of the award, *Chicago v. Barbican* (1875) 80 Ill. 482; *Pool v. Butler* (1903) 141 Cal. 46, 74 Pac. 444; *Cunningham v. Memphis Term. Co.* (1912) 126 Tenn. 343, 149 S. W. 103, on the ground that the condemnor should be allowed to decide whether it wishes to take the property at the price fixed by the award. See *O'Neill v. Freeholders of Hudson* (1879) 41 N. J. L. 161. On the other hand, it has been held that the confirmation of the award has the effect of a judgment reciprocally vesting the rights of the parties and that thereafter the right to discontinue the proceedings is ter-

minated. *Matter of Rhinebeck & Conn. R. R., supra*; *Union Ry. v. Standard Wheel Co.* (C. C. A. 1906) 149 Fed. 698, on the ground that otherwise great inconvenience and damage would result to the landowner. See *Drath v. Burlington, etc. R. R.* (1884) 15 Neb. 367, 18 N. W. 767. It would seem, however, that in those jurisdictions which regard the award as merely fixing the price at which the condemnor can obtain the land if he chooses, the landowner should be allowed to recover damages caused by the public service company in not giving notice of abandonment of the proceedings within a reasonable time after the award has been fixed. See *Winkelman v. Chicago* (1905) 213 Ill. 360, 72 N. E. 1066; but see 2 Lewis, *Eminent Domain* (3rd ed.) § 957. As a further protection to the landowner in such jurisdictions, the award fixed in condemnation proceedings is so far binding upon the condemnor that the question of the amount of the compensation cannot again be litigated. *Illinois Central R. R. v. Champaign* (1896) 163 Ill. 524, 45 N. E. 120. It would seem that whether the award is to be regarded as a judgment finally determining the rights of the parties, or merely a price at which the condemnor can take the land if it chooses is a question of policy; and neither view can be quarreled with since both reach practically the same results. The view taken by the court in the principal case is preferable only in that it provides a simpler and more expeditious method of determining the controversies that might be involved.

FIXTURES—CHATTEL ANNEXED TO LAND BY MISTAKE.—The plaintiff, under a mistake as to the boundary line between his lot and the defendant's, built a fence on the defendant's land, despite the defendant's objection. *Held*, that he could replevy the fence, on the defendant's refusal to allow its removal. *Ousley v. Lambeth* (Mo. App. 1917) 199 S. W. 594.

When the owner of a chattel affixes it to another's land, without permission, and in such a manner that it would become a fixture if chattel and land belonged to the same person, it becomes the property of the owner of the soil. *Barnes v. Hosmer* (1907) 196 Mass. 323, 82 N. E. 27; *Ward v. Ives* (1916) 91 Conn. 12, 98 Atl. 337. The rule operates with the fullest vigor where the person annexing the chattel is a mere trespasser. *Perley v. City of Cambridge* (1915) 220 Mass. 507, 108 N. E. 494; 7 Columbia Law Rev. 21. Express or implied assent by the landowner that the chattel remain the property of the annexing owner, will be effective as regards the parties and subsequent purchasers with notice. *Boeringa v. Perry* (Wash. 1917) 164 Pac. 773; *Clayton v. Phillipp* (Tex. Civ. App. 1913) 159 S. W. 117. Mutual mistake of the parties, who think the owner of the chattel is affixing it to his own land, is generally held not equivalent to consent on the part of the owner of the land to which it has actually been affixed. *Kimball v. Adams* (1881) 52 Wis. 554. The Missouri courts, however, have consistently interpreted such mistake as assent. *Lowenberg v. Bernd* (1871) 47 Mo. 297; *Ewell, Fixtures*, 59, n. 2. But there was no bilateral mistake in the instant case; the defendant was aware of his rights, and apprised the plaintiff of them. Nor may assent be implied from failure to prevent the building of the fence. The defendant had given notice that he proposed to keep the fence if built upon his land, and his subsequent inaction accordingly evidenced acquiescence only in the conferment upon him of a voluntary benefit. It is submitted that the case was within the general rule as to chattels affixed by a trespasser, and that recovery should have been denied as a matter of law.

HUSBAND AND WIFE—NECESSARIES—MERCHANDISE FURNISHED ON THE WIFE'S CREDIT.—Necessaries were supplied to the wife on her own credit. The merchant, unable to collect from the wife, sues the husband at law. *Held*, the husband is not liable. *Wickstrom v. Peck* (App. Div. 1st Dep't. 1917) 167 N. Y. Supp. 408.

It seems to be well recognized that the so-called "imputed agency" of the wife for the purchase of necessities is not a real agency, and that the resulting relationship between the husband and the merchant is not one of contract. See *Bergh v. Warner* (1891) 47 Minn. 250, 50 N. W. 77; Spencer, Domestic Relations § 121; 9 Columbia Law Rev. 72. Nothing is gained by calling the liability quasi-contractual, but it is sufficient to state that it is one imposed on the husband by law because the courts have thought that public policy demanded that he be so liable. It is very clear that such liability was worked out through the fiction of an agency, and the doctrine of the principal case is a natural result once the agency theory has been established. If the wife did not presume to act for the husband the fiction would not prove adequate, excluding the principles of undisclosed principal. The principal case represents the great weight of authority. *Byrnes v. Rayner* (1895) 84 Hun 199, 32 N. Y. Supp. 542; *Gafford v. Dunham* (1895) 111 Ala. 551, 20 So. 346; see *Noel v. O'Neill* (1916) 128 Md. 202, 97 Atl. 513; *contra*, *Edminston v. Smith* (1907) 13 Idaho 645, 92 Pac. 842. Many of the cases refer to two early English decisions, *Metcalf v. Shaw* (1811) 3 Campbell 22; *Bentley v. Griffin* (1814) 5 Taunton 356, as of great authority; but neither is a precedent, for the former was decided on the ground that the husband was not liable on a promissory note signed by the wife, and in the latter the goods were not necessities. As the principles of contract and agency have no application, there would seem to be nothing illogical about making the husband directly liable. In those jurisdictions which allow the wife an action against the husband for money that she herself has been forced to expend for necessities, *De Brauwere v. De Brauwere* (1911) 203 N. Y. 460, 96 N. E. 722; *Rogers v. Rogers* (1914) 93 Kan. 114, 143 Pac. 410, a direct action against the husband is only a short-cut which imposes no greater liability upon him. In explaining the direct liability of an undisclosed principal, where it was shown that the third party could sue the agent and the agent the principal, it has been said "nothing but more or less technical rules of procedure would seem to stand in the way of". Mechem, Agency (2nd ed.) § 1729. The policy of modern legislation, to make both husband and wife liable for family expenses regardless of the question as to whose credit was pledged, see Ill. Stat. Ann. § 6152; Iowa Code § 3165; Lord's Ore. Laws § 7039, should induce the courts to adopt a less technical attitude.

INSURANCE—INTOXICATING LIQUORS—LEGALITY OF CONTRACT.—In a suit on a policy of fire insurance on a stock of intoxicating liquors which required the liquors to be kept in a "building occupied for mercantile purposes", it being unlawful to sell liquors, *held*, the policy was void. *Wood v. First Nat'l. Fire Ins. Co.* (Ga. 1917) 94 S. E. 622.

The statement is sometimes found that a policy of insurance on a stock of liquors illegally kept for sale is valid, see Elliott, Insurance 14, but this statement requires some modification. It is true that if a contract of insurance be valid in its inception, it is not avoided by subsequent illegal acts. *Insurance Co. of North America v. Evans* (1902) 64 Kan. 770, 68 Pac. 623; *Hinckley v. Germania Fire Ins. Co.*

(1885) 140 Mass. 38, 1 N. E. 737. Furthermore, when the goods insured are capable of legitimate use, the fact they are used for an illegal purpose will not avoid the policy. *Erb v. German-American Ins. Co.* (1896) 98 Iowa 606, 67 N. W. 583; see *Insurance Co. of North America v. Evans*, supra; but cf. *Johnson v. Union Marine Ins. Co.* (1879) 127 Mass. 555. But the foregoing cases must be distinguished from those in which the policy has been declared void either because it was a necessary condition of the policy that an illegal act be performed, see *Niagara Fire Ins. Co. v. De Graff* (1863) 12 Mich. 124; *Erb v. German-American Ins. Co.*, supra, or because the contract was entered into for the direct purpose of protecting an illegal traffic. *Mount v. Waite* (N. Y. 1811) 7 Johns. 434; *Russell v. De Grand* (1818) 15 Mass. 35. The failure to distinguish between insurance on the property and insurance on the business has led some courts to declare the contract void in all cases. *Kelly v. Home Ins. Co.* (1867) 97 Mass. 288; *Johnson v. Marine Ins. Co.*, supra. The court in the principal case evidently considered this policy as being on the business and accordingly refused to allow the insured to recover.

INSURANCE—LIABILITY INSURANCE—EXERCISE OF INSURER'S RIGHT TO DEFEND OR SETTLE.—The plaintiff was insured by the defendant to the extent of \$5,000 against liability from accidents resulting from the operation of an automobile. The defendant had the exclusive right to defend or settle all actions arising out of such accidents. A third party, who had been struck by the plaintiff's automobile, offered to compromise for \$3,150 which the defendant refused to pay unless the plaintiff contributed \$750. The plaintiff paid the \$750 for which this action is brought. Held, he could not recover. *Levin v. New England Casualty Co.* (1917) 101 Misc. 402, 166 N. Y. Supp. 1055.

An action may be maintained to recover money paid under duress provided the retention of the benefit therefrom is unconscionable. Woodward, Quasi-Contracts § 211. Assuming that the insurer acted in bad faith, the facts of the principal case would seem to afford sufficient evidence of coercion. Cf. *Brown & McCabe v. London, etc. Co.* (D. C. 1915) 232 Fed. 298. However, in order to determine whether the insurer is acting unconscionably, it is necessary to inquire into the nature of its relationship to the insured. An insurer against claims of third parties is ordinarily given the exclusive right to defend or settle such claims, 16 Columbia Law Rev. 605, in order to minimize its liability under the policy. See *Connolly v. Bolster* (1905) 187 Mass. 266, 72 N. E. 981. As against third parties, it may exercise this right for its own benefit, even though in so doing the interests of the insured be prejudiced, *New Orleans, etc. R. R. v. Maryland Casualty Co.* (1905) 114 La. 153, 38 So. 89, since the right is given on the understanding that it be so exercised. See *Davidson v. Maryland Casualty Co.* (1908) 197 Mass. 167, 83 N. E. 407. But, inasmuch as the insurer must exercise its authority to defend or settle with due care, *Attleboro Mfg. Co. v. Frankfort, etc. Co.* (C. C. 1907) 171 Fed. 495, and in good faith, *Brassil v. Maryland Casualty Co.* (1914) 210 N. Y. 235, 104 N. E. 622; *Brunswick Realty Co. v. Frankfort Ins. Co.* (1917) 99 Misc. 639, 166 N. Y. Supp. 36; see *New Orleans, etc. R. R. v. Maryland Casualty Co.* supra, it would seem there is a confidential relationship between the insured and the insurer. Therefore, the insurer is acting unconscionably if it deliberately uses as a means of offense against the insured an authority intended to be asserted protectively

in transactions with third persons. *Brown & McCabe v. London, etc. Co., supra*. On the other hand, unless it appears that the insurer was actuated by motives other than that of self-protection, no action will lie against it, *cf. Wisconsin Zinc Co. v. Fidelity, etc. Co.* (1916) 162 Wisc. 39, 155 N. W. 1081, and it is on this hypothesis that the principal case may be sustained.

INSURANCE—WAR RISK—PERILS OF THE SEA.—A vessel insured against war risks but not against perils of the sea was boarded by an English naval officer and compelled to proceed by a course from which the aids to navigation had been removed for war purposes. The ship was subsequently wrecked. *Held*, that the loss was caused by a war risk. *Muller v. Globe & Rutgers Fire Ins. Co.* (2 C. C. A. 1917) 246 Fed. 759.

In determining whether a loss is caused by war risk or peril of the sea, only the proximate and not the remote cause is considered, see *France v. North of England, etc. Ass'n.* [1917] 2 K. B. 522, *Ionides v. Universal Marine Ins. Co.* (1863) 14 C. B. (N. S.) 259. Proximate cause is in all such cases purely a question of fact. *Donegan v. Baltimore, etc. Ry.* (C. C. A. 1908) 165 Fed. 869. Generalizations are therefore difficult to make, and it is only from an examination of the decided cases that it can be discovered what the courts mean by proximate cause. For example, the seizure of a ship in consequence of hostilities is a loss due to war risk regardless of the fact that the ship is subsequently destroyed through perils of the sea, *Andersen v. Marten* [1908] A. C. 334, see *Magoun v. New England Marine Ins. Co.* (1840) 16 Fed. Cas. No. 8961; a loss by collision due to absence of navigation lights in pursuance of admiralty instructions is due to war risk. *British, etc. Co. v. Rex* [1917] 2 K. B. 769. On the other hand it has been held that the mere increase of sea peril by removal for belligerent purposes of aids to navigation affords no basis for recovery as from loss due to war risk, *Ionides v. Universal Marine Ins. Co., supra*, probably, as the court in the principal case points out, on the ground that such act merely restores the perils of the sea to their normal; and recovery was denied where it was shown that the aids to navigation would have been of no avail had they been present. *Le Quellec v. Thomson* (1916) 115 L. T. R. (N. S.) 224. It has also been held that damage to a vessel caused by its running on the wreck of another vessel torpedoed by an enemy submarine was due to perils of the sea, and not to war risk, the torpedoing being a cause too remote. *France v. North of England Ass'n., supra*. It seems that the general rule, so far as there is one, is that "the hostile agency first in operation gives character to the whole connected catastrophe". Richards, *Insurance* (3rd ed.) § 441; *cf. Insurance Co. v. Boon* (1877) 95 U. S. 117, and that the court in principal case properly applied this test.

JUDGMENTS—DISMISSAL BY AGREEMENT—PLEAS IN BAR.—The plaintiff sued the defendant for damages for personal injury. The defendant pleaded in bar a former judgment which dismissed the cause by agreement of the parties, the defendant paying costs. *Held*, the judgment of dismissal operated as a bar to a subsequent action on the same cause. *Doan v. Bush* (Ark. 1917) 198 S. W. 261.

As a general rule the mere voluntary dismissal of an action by the plaintiff is not a bar to a subsequent suit brought on the same cause. Freeman, *Judgments* (3rd ed.) § 261. To make the judgment of dismissal *res judicata* it is necessary that it be entered either on the merits

of the case or because of a voluntary *retraxit* on the part of the plaintiff. See *Merritt v. Campbell* (1874) 47 Cal. 542. A dismissal by agreement can be pleaded in bar if the parties stated in the agreement that it should be a bar. *Heironymous v. Heironymous* (1884) 64 Iowa 81, 19 N. W. 855. But where the agreement itself is not offered in evidence, the majority rule is that the mere words in a judgment "dismissed by agreement" conclusively show that the parties intended the dismissal to operate as a final settlement of the case, and as a result, to act as a bar to a subsequent suit. *Hoover v. Mitchell* (1874) 66 Va.* 387; *Bank of the Commonwealth v. Hopkins* (1834) 32 Ky. *395; *contra*, *Halde- man v. United States* (1875) 91 U. S. 584; *State, etc. Board v. Stewart* (1907) 46 Wash. 79, 89 Pac. 475. This inference seems unfounded, as the parties may have intended merely an agreement to dismiss pending an attempt to settle the controversy out of court, or they may have agreed only to an extension of time for the defendant. No presumption of a final settlement can rightly be raised by the words "dismissed by agreement", nor from the fact that the defendant also agreed to pay costs. See *Haldeman v. United States, supra*; but see *Phillpotts v. Blasdel* (1874) 10 Nev. 19. The majority rule seems to be based on an unwarranted inference, and in the instant case, therefore, the plea in bar should have been held bad.

LIMITATION OF ACTIONS—OPERATION OF STATUTE ON ONE CAUSE OF ACTION DURING PENDENCY OF ANOTHER—PROTECTION AFFORDED IN EQUITY.—The plaintiff sought to enjoin suit on a promissory note which he had given to the defendant in settlement of a tort claim. It was found that the note had been given as a result of the undue influence of third parties, but that the defendant had acted in good faith. The injunction was granted, but the defendant's original cause of action in tort was retained to be tried as a law action in order to prevent the bar of the Statute of Limitations. *Macke v. Jungels* (Neb. 1918) 166 N. W. 191.

Since statutes of limitations are in derogation of vested rights otherwise enforceable, they will be construed strictly against the party setting up a defense under them, Endlich, Interpretation of Statutes 343, and exceptions thereto will be construed liberally. *Gaines v. New York* (1915) 215 N. Y. 533, 109 N. E. 594. Thus the statute does not run against a cause of action while it is being sued upon; Wood, Limitations (4th ed.) § 253a; and there are generally provisions permitting a plaintiff to recommence an action which has been dismissed otherwise than on the merits, N. Y. Code Civ. Proc. § 405; Page & Adams, Ohio Gen. Code § 11233, unless he has acted in bad faith. *Hardin v. Coss County* (C. C. A. 1890) 42 Fed. 652. Some statutes contain provisions suspending their operation where the cause of action has been fraudulently concealed by the defendant, Park's Ga. Civ. Code § 4380, and independently of legislative enactment the courts, especially courts of equity, have reached the same results. 5 Columbia Law Rev. 403. Similarly, where the defendant has by fraudulent means induced the plaintiff to permit the statutory period to run, he will not be allowed to set up the Statute of Limitations as a defense. *Barnett v. Nichols* (1879) 56 Miss. 622. Although in the principal case, there was no fraudulent conduct on the part of the defendant, the plaintiff on the other hand was justified in relying on the note, and it would seem proper for a court of equity to grant an injunction upon condition that the Statute of Limitations be not pleaded as a bar in a suit on the original cause of

action, or to retain the tort action and effect the same result in the exercise of its plenary jurisdiction as was done in the principal case. *Eaton*, Eq. Jur. § 10.

MUNICIPAL CORPORATIONS—ORDINANCES—PICKETING IN STREETS.—Under a provision in a city charter empowering the city to protect health, life and property, and to preserve order and security within its limits, an ordinance was passed prohibiting loitering on, or walking back and forth in, the streets, before places of business, for the purpose of persuading persons from entering to transact business. *Held*, such an ordinance was a valid exercise of the police power. *Ex parte Stout* (Tex. Crim. App. 1917) 198 S. W. 967.

Municipal police power to regulate the use of streets is limited by the common right of use possessed by the public. This common right is that of passing along the streets for business or pleasure, on foot or by vehicles. *Freund*, Police Power § 168. Regulation in the public interest, not unreasonably interfering with this fundamental right, is generally upheld. Some jurisdictions hold ordinances prohibiting loitering on the streets invalid, the right of use including that of loitering. *City of St. Louis v. Gloner* (1908) 210 Mo. 502, 109 S. W. 30. The Pennsylvania courts uphold such legislation, ruling that the common right is that of transit only, with such stoppages as business necessity, accident, or the exigencies of travel, require. *Commonwealth v. Challis* (1898) 8 Pa. Super. Ct. 130. Ordinances forbidding the public selling of theater tickets, *People ex rel Lange v. Palmittter* (1911) 128 N. Y. Supp. 426, 71 Misc. 158, or merchandise, *Commonwealth v. Ellis* (1893) 158 Mass. 555, 33 N. E. 651, or the "drumming" of patronage for hotels, etc., *Baird v. Bray* (1916) 125 Ark. 511, 189 S. W. 657, in the streets, and one prohibiting, with certain exceptions, the display there of advertisements on vehicles, *Fifth Ave. Coach Co. v. City of New York* (1909) 194 N. Y. 19, 86 N. E. 824, have been upheld; the practice legislated against in each instance tended to impede passage in the streets, and its exercise was not a common right. Unlicensed street speeches and meetings may similarly be forbidden. *Love v. Judge of Recorder's Court* (1901) 128 Mich. 545, 87 N. W. 785. Legislation directed against the carrying of signboards in the streets has been upheld. *Commonwealth v. McCafferty* (1889) 145 Mass. 384, 14 N. E. 451. The principal case is supportable on similar grounds. Picketing, even when conducted without threat or coercion, is calculated to provoke disorder. Its prohibition is a proper exercise of the police power, for the common right does not extend to use for purposes of public argument and persuasion.

SALES—FAILURE TO RETURN GOODS AFTER TRIAL—ACCEPTANCE.—The plaintiff delivered to the defendant a piano which the latter agreed to try for 30 days, at the end of which time he was to keep it, if satisfied, and pay for it under the terms of a contract then to be signed. If not satisfied, the defendant was to return the piano. The defendant kept the piano for more than six months before expressing his disapproval. *Held*, that he had accepted the instrument and was liable for the price. *F. O. Evans Piano Co. v. Tully* (Miss. 1917) 76 So. 833.

It is well established that where goods are left with a prospective vendee on approval for a fixed trial period, but no mention is made of the time within which approval must be expressed, such expression must be made within a reasonable time after the end of the trial period.

Springfield Engine Stop Co. v. Sharp (1903) 184 Mass. 266, 68 N. E. 224. The law seems to be equally well settled that retention of the goods for a longer time transfers title to the prospective vendee and makes him absolutely liable for the price. *American Electric Tel. Co. v. Emporia Tel. Co.* (1910) 83 Kan. 64, 109 Pac. 780; *In re Downing Paper Co.* (C. C. A. 1905) 147 Fed. 858. The principal case must be distinguished from that of a "sale or return" where the expiration of the period for return fixes the liability of the vendee if he has not expressed his dissatisfaction by that time. *International Filter Co. v. Cox Bottling Co.* (1913) 89 Kan. 645, 132 Pac. 180; *Fiss, etc. Co. v. Schwartzchild* (1910) 121 N. Y. Supp. 292. The Sales Act is not in force in the jurisdiction of the principal case and its application is not involved. There seems no doubt, however, that where it is in force its provisions would cover the facts, as assumed by the court. Title would pass to the vendee, in the absence of an expression of approval, at the end of the time agreed upon for such expression, or at the end of a reasonable time, in the absence of such agreement. Uniform Sales Act § 19, N. Y. Per. Prop. Law § 100; see *Isaacs v. Macdonald* (1913) 214 Mass. 487, 102 N. E. 81; Williston, Sales § 272. The fact that the defendant never signed the formal contract would not affect his liability under the original agreement, since an agreement to sign a contract whose terms are settled is binding on the parties, whether the formal contract is signed or not. *New York, etc. Co. v. Meyersdale Coal Co.* (C. C. A. 1914) 217 Fed. 747; *Berman v. Rosenberg* (Me. 1916) 97 Atl. 6. But there is force in the dissenting opinion in the principal case, where it is insisted that the original agreement, even if binding, was to sign one of three formal contracts. In this view of the facts it is clear that the Sales Act could have no application, and that any recovery by the plaintiff would be limited to the actual damages suffered from the breach of the original agreement. *Isaacs v. Macdonald, supra*. On this point the principal case can be supported only on the assumption set forth in the majority opinion, that the agreement was to sign one definite contract for a fixed price.

SURETYSHIP—DISCHARGE OF SURETY—RELEASE OF ATTACHMENT.—The defendant was indorser of a promissory note of which the plaintiff had become holder. The plaintiff had commenced a suit against the maker and attached the property of the latter, but had subsequently discontinued the suit and released the attachment. *Held*, that the release of the attachment did not discharge the surety. *Howard Nat'l. Bank v. Arbuckle* (Vt. 1917) 102 Atl. 476.

As a general rule, a surety is not released by the mere inaction of the creditor, Stearns, Suretyship § 95, unless the inaction constitutes gross negligence, such as the failure to record a chattel mortgage, in which event the surety is discharged to the extent of the loss caused him. *Hendryx v. Evans* (1903) 120 Iowa 310, 94, N. W. 853; see *Nunn v. Smith* (Tex. Civ. App. 1917) 194 S. W. 406; *contra, Philbrooks v. McEwen* (1868) 29 Ind. 347. Usually, however, any act on the part of the creditor which tends to injure the surety releases the latter, *City of Maquoketa v. Willey* (1872) 35 Iowa 323, and, in accordance with this rule, a release of an execution lien upon the property of the principal discharges the surety. *Winston v. Yeargin* (1873) 50 Ala. 340; *Williams v. Brown* (1912) 70 W. Va. 472, 74 S. E. 409. When, however, the creditor before judgment merely attaches the property of the principal debtor and subsequently releases the attachment, some

courts have refused to consider the surety as discharged, basing their decision either on the ground that, since the creditor was not bound to begin the action, he was not bound to preserve the attachment, *Coller v. Vivian* (1846) 8 Ala. 903, or that the preservation of the attachment required active diligence and continual expense. *Morrison v. Bank* (1889) 65 N. H. 253, 20 Atl. 300. The former theory seems inconsistent with the decisions in cases where the creditor has proceeded to execution, and the latter theory seems contrary to the general rule forbidding any positive act on the part of the creditor detrimental to the surety. It would seem, therefore, that in cases such as the instant case, the willful act of the creditor should have the effect of releasing the surety. *Spring v. George* (1888) 50 Hun 227, 3 N. Y. Supp. 43; *Bank of Missouri v. Malson* (1857) 24 Mo. 333; *City of Maquoketa v. Willey, supra*.

SURETYSHIP—SUBROGATION—SURETY ON APPEAL BOND.—The defendant was surety for H on a guardian's bond. A judgment was given rendered against H in a suit by C for misappropriated funds. H appealed, giving the plaintiff as surety on the appeal bond. Judgment was affirmed and the plaintiff was obliged to pay it. He now sues the defendant in C's name for the amount of the judgment, claiming to be subrogated to all of C's rights. *Held*, he was primarily liable as between himself and the defendant and hence could not recover. *National Surety Co. v. White* (Ga. 1917) 94 S. E. 589.

Where several sureties are liable for the same debt they are entitled as between themselves to contribution upon the equitable principle that, since all are equally obligated, each should bear his proportionate share of the loss which the default of the debtor has cast upon them. Brandt, *Suretyship and Guaranty* (3rd ed.) § 279. Since the application of this equitable principle depends upon the sureties standing in a similar position to the creditor in regard to the debt of the principal, see *Schram v. Werner* (1895) 85 Hun 293, 32 N. Y. Supp. 995, it follows that a surety may by agreement so alter his rights as against the other sureties as to make himself liable secondarily, *Bulkely v. House* (1893) 62 Conn. 459, 26 Atl. 352; *Schram v. Werner, supra*, or primarily, *Rowlatt, Principal and Surety* 220; see *Glenn v. Wallace* (S. C. 1850) 4 Strob. Eq. 149, as between himself and a prior surety. The case of a subsequent surety in a judicial proceeding is an illustration of this. A surety on a stay of execution, bail, or appeal bond substitutes his own obligation for that of the person or property of the principal debtor which might otherwise have been taken to satisfy the debt. It would seem to be a fair inference that by so doing he agrees to become as between himself and a prior surety primarily liable for the debt. See *Wright v. Morley* (1805) 11 Ves. Jr. 12, 22, commenting on *Parsons v. Briddock* (1708) 2 Vern. 608. The courts have generally held that a subsequent surety on a stay of execution bond, *Anderson v. Hendrickson* (Neb. 1901) 95 N. W. 844, on a bail bond, *Smith v. Bing* (1827) 3 Ohio 33, or on an appeal bond, *Fidelity & Deposit Co. v. Bowen* (1904) 123 Iowa 356, 98 N. W. 897; but *cf. Howe v. Frazer* (La. 1842) 2 Rob. 424, is primarily liable, and cannot claim contribution or indemnification from a prior surety. Conversely, if the prior surety is called upon to pay, he will be subrogated to the creditor's rights against the subsequent surety on a stay of execution bond, *Schnitzel's Appeal* (1865) 49 Pa. 23; but *cf. Holmes v. Day* (1871) 108 Mass 563, on a bail bond, *Parsons v. Briddock, supra*, or

on an appeal bond. *Opp. v. Ward* (1890) 125 Ind. 241, 24 N. E. 974; *Culliford v. Walser* (1899) 158 N. Y. 65, 52 N. E. 648; *contra, Rosenbaum v. Goodman* (1883) 78 Va. 121. The principal case is in accord with the weight of authority and would seem to be sound.

TELEGRAPH COMPANIES—DUTY TO SEND BY RIVAL LINE.—A death message was accepted by the defendant company at X, addressed to the plaintiff at Z. The defendant, having no office at Z, customarily made connections from Y by an allied telephone company. The message was forwarded from Y by mail, because telephone service had been discontinued, although connections with Z could have been made through a rival telegraph company. *Held*, the defendant was negligent in not forwarding by the rival line. *Western Union Tel. Co. v. Teague* (Miss. 1918) 77 So. 302.

The responsibility of a telegraph company for the transmission of messages is analogous to that of a common carrier; the former, however, is not subject to an insurer's liability, being held only to the exercise of due care. Jones, *Telegraph and Telephone* (2nd ed.) § 270. The terms of the contract in the principal case are not clearly stated. If the defendant agreed to deliver to the telephone company as a connecting line, its liability was limited to delays occurring on its own line, Jones, *op. cit.* § 447; *Smith v. Western Union Tel. Co.* (1892) 84 Tex. 359, 19 S. W. 441, but it was bound to notify the sender of the connecting company's inability to forward. See *Western Union Tel. Co. v. Sorsby* (1902) 29 Tex. Civ. App. 345, 69 S. W. 122. But if, as seems probable, the defendant undertook to deliver at Z, it should be held to a strict performance of this agreement, whether, under the facts, the telephone company be a connecting line, Jones, *op. cit.* § 452; see *Western Union Tel. Co. v. Stratemeier* (1892) 6 Ind. App. 125, 32 N. E. 871; *cf. Northern Pac. Ry. v. American Trading Co.* (1904) 195 U. S. 439, 25 Sup. Ct. 84, an extension of the defendant's own system, *Western Union Tel. Co. v. Hargrove* (1896) 14 Tex. Civ. App. 79, 36 S. W. 1077, or a medium of delivery. *Western Union Tel. Co. v. O'Keefe* (Tex. 1895) 29 S. W. 1137; but *cf. King v. Western Union Tel. Co.* (1909) 89 Ark. 402, 117 S. W. 521; *Cumberland Tel. & Tel. Co. v. Ather-ton* (1906) 122 Ky. 154, 91 S. W. 257. Another route being open, its duty was an alternative one, either to notify the sender, *Swan v. Western Union Tel. Co.* (C. C. A. 1904) 129 Fed. 318, or to forward by the best available route, whether this was over its own lines or over a rival line. *Fleischner v. Pacific Postal Tel. Cable Co.* (C. C. 1893) 55 Fed. 738, *aff'd* 66 Fed. 899. The most probable interpretation of the facts in the principal case is to consider the contract as calling for delivery at Z, and to regard the telephone company as an extension of the defendant's own system. But, upon whatever theory the decision rests, the defendant's liability seems clear, since the message had not left its own line, and the sender was not notified of the delay.

TRUSTS—STATUTE OF FRAUDS—PAROL TRUST IN PROCEEDS OF REALTY.—The plaintiff's father conveyed land by deed absolute to the defendant's testatrix, who agreed to hold the land in trust for her own benefit during her life, and after her death it was to go to the plaintiff; and if she sold the land, to hold the principal in trust for the plaintiff, who should get it on her death. The testatrix sold the land, and the plaintiff now brings a bill against her executor. *Held*, where land is conveyed on parol trust to hold the proceeds, and the land is sold, the

statute of frauds is no defense, and the trust will be enforced. *Chace v. Gardner* (Mass. 1917) 117 N. E. 841.

Where land is conveyed under a parol promise that it be held in trust, the statute of frauds will prevent the enforcement of the trust. *Fillingham v. Nichols* (1900) 108 Wis. 49, 84 N. W. 15; *Perry, Trusts* (6th ed.) § 79. But equity will generally permit the grantor to recover the property on the theory of unjust enrichment. *Greenley v. Shelmidine* (1903) 83 App. Div. 559, 82 N. Y. Supp. 176; see *Goldsmith v. Goldsmith* (1895) 145 N. Y. 313, 39 N. E. 1067. Hence it ought to permit the recovery of the proceeds on the same theory. *Greenley v. Shelmidine, supra*. If there is an express oral agreement to sell the land and hold the proceeds in trust, equity will not force the grantee to make the sale, since a contract to sell lands is also within the Statute of Frauds. *Walters v. Walters* (1916) 172 N. C. 328, 90 S. E. 304; see *Bork v. Martin* (1892) 132 N. Y. 280, 30 N. E. 584. But if the lands have already been sold at the time the beneficiary files his bill, most courts have enforced the agreement as to the proceeds as an oral trust of personalty. *Logan v. Brown* (1908) 20 Okla. 334, 95 Pac. 441; *Talbott v. Barber* (1894) 11 Ind. App. 1, 38 N. E. 487; *Bork v. Martin, supra*. This latter agreement can stand entirely on its own feet, and the case falls within the general rule that where that part of an agreement which is within the Statute of Frauds has been performed, the statute no longer applies. *Cf. Zwicker v. Gardner* (1912) 213 Mass. 95, 99 N. E. 949. But some courts hold that the agreement is an attempt to create an oral trust in lands, or a contract for the sale of lands, and refuse to enforce a trust as to the proceeds. *Johnson v. McKenzie* (1916) 80 Ore. 160, 156 Pac. 791; *Graham v. Conner* (1916) 97 Kan. 150, 154 Pac. 246; *White v. McKenzie* (1916) 193 Mich. 189, 159 N. W. 367. If however the grantor voluntarily declares himself a trustee of his own lands, and agrees to hold the proceeds of the land in trust, a different situation arises. While equity will enforce a voluntary trust which is completely declared, *Watson v. Payne* (1910) 143 Mo. App. 721, 128 S. W. 238, it will not compel the trustee to create the trust. Since there is no enforceable trust as to the land, and the promise as to the proceeds is without consideration, it would seem that the promisor should be allowed to repudiate at any time before selling the land, as otherwise equity would be in effect compelling the creation of the trust. Nor would it seem that the mere sale of the land without prior declaration of revocation should be considered as creating an enforceable trust of the proceeds. Since the trustee is not bound to perform, there must be proof that he did perform, and the mere sale of the property and receipt of the proceeds would hardly be sufficient evidence. But where the trustee keeps the proceeds as a fund apart from the remainder of his property, or in any other way shows that he is holding the proceeds as a trust fund, it would seem that a valid enforceable trust had arisen. See *Watson v. Payne, supra*.

WORKMEN'S COMPENSATION ACTS—CASUAL AND EMERGENCY EMPLOYEES HIRED BY OTHER EMPLOYEES.—The defendant's driver, in the course of his employment, requested the plaintiff to assist him in removing his wagon from the mire and while so engaged the plaintiff was injured. *Held*, an emergency existed sufficient to give the driver authority to employ the plaintiff and, since the service, though casual, was in the usual course of the master's business, the defendant was liable under the

compensation act. *Neinaber v. District Court of Ramsey County* (Minn. 1917) 165 N. W. 268.

Before the era of workmen's compensation acts, it was generally settled that there could be no recovery from an employer, on the basis of his duty toward an employee, by one assisting at the request of an employee, *Atlanta, etc. R. R. v. West* (1905) 121 Ga. 641, 49 S. E. 711; *Everhart v. Terre Haute, etc. R. R.* (1881) 78 Ind. 292, on the ground that the employee had no authority to hire. *Church v. Chicago, etc. Ry.* (1892) 50 Minn. 218, 52 N. W. 647; *Kentucky, etc. Co. v. Nicholson* (1914) 157 Ky. 812, 164 S. W. 84. But, as an exception to the rule, in the case of an emergency it was uniformly implied that the situation conferred a valid authority to obtain help, see *Marks v. Rochester Ry.* (1895) 146 N. Y. 181, 190, 40 N. E. 782, and accordingly an employer was held to be under a duty to one hired by an employee during an emergency. *Louisville, etc. R. R. v. Ginley* (1897) 100 Tenn. 472, 45 S. W. 348; see *Georgia, etc. Ry. v. Propst* (1887) 83 Ala. 518, 3 So. 764; *Aga v. Harbach* (1905) 127 Iowa 144, 102 N. W. 833. The fact of the emergency was a question for the jury. *Central, etc. Co. v. Miller* (1912) 147 Ky. 110, 143 S. W. 750; see *Marks v. Rochester Ry.*, *supra*. A recovery in "emergency" cases would naturally not be denied under a compensation act broad enough to include casual employments, provided the emergency occurred in the usual course of business. If it is necessary to the business, the employment may be in the usual course, even though the cause requiring it was unusual. Since all emergency employments are necessarily casual, it should be determined preliminarily whether the particular statute embraces casual employments. If it does not, the remedy of the statute may not be claimed; *Le Grande, etc. Co. v. Pillsbury* (1916) 173 Cal. 777, 161 Pac. 988; but, as in the principal case, unless it specifically excludes them, it will be deemed to include them. See *Matter of Rheinwald* (1915) 168 App. Div. 425, 153 N. Y. Supp. 598.

WORKMEN'S COMPENSATION ACTS—EXCLUSIVENESS OF REMEDY—EXTRA-TERRITORIALITY.—The plaintiff's decedent was killed in New York while discharging his duties under a contract of hire made in New Jersey. An action for damages was brought against his employer by the plaintiff as administratrix in New York. Held, that the New Jersey Compensation Law was a bar to this action. *Barnhart v. American Concrete Steel Co.* (App. Div. 2nd Dep't. 1917) 167 N. Y. Supp. 475.

The remedy given to an employee by a compensation act is generally exclusive; *Shannahan v. Monarch Engineering Co.* (1916) 219 N. Y. 469, 114 N. E. 795; *Peter v. Mills* (1913) 76 Wash. 437, 136 Pac. 685; and hence when an employee is brought under the act of a particular state, he can maintain no common law action for an injury received within that state in the course of his employment. *Albanese v. Stewart* (1912) 78 Misc. 581, 138 N. Y. Supp. 942; *Johnson v. Nelson* (1915) 128 Minn. 158, 150 N. W. 620. Where, however, the terms of an act do not apply the employee may avail himself of other remedies. *Shinnick v. Clover Farms Co.* (1915) 169 App. Div. 236, 154 N. Y. Supp. 423. The question raised in the principal case is whether an act binding an employee in one state can prevent him from bringing a common law action in another state in which he suffered an injury in the course of employment. Since workmen's compensation is not merely a new tort remedy but also a form of social insurance, its real purpose is

better effectuated by applying it extra-territorially, see *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372, and by the weight of authority an act, either compulsory, *Matter of Post v. Burger & Gohlke* (1916) 216 N. Y. 544, 111 N. E. 351, or elective, *State v. District Court* (Minn. 1918) 166 N. W. 185; *Johnson v. Nelson*, *supra*; *contra*, *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, is so applied, on the theory that it is part of the contract of hire. Though the assertion is made that such a theory is inapplicable to a compulsory act, see 31 Harvard Law Rev. 630, *et seq.*, it would seem that the contractual element necessary to incorporate the act into the contract of hire, can be found in the voluntary assumption of the relation of master and servant by the parties to that contract. *Cf. Matter of Post v. Burger & Gohlke*, *supra*, 556. It follows, therefore, that the principal case is correct in holding that the New Jersey statute could be set up as a bar to the tort action in New York.

BOOK REVIEWS.

FRANCIS GOERTNER, *Editor-in-Charge.*

THE LAW OF CONVERSION. By RENZO D. BOWERS. Boston: LITTLE, BROWN & Co. 1917. pp. lx, 583.

The most noticeable feature of this book is the almost total absence of discussion, or even citation, of the leading English decisions, upon which rests the greater part of the American law upon the subject. It is amazing, to say the least, that a work purporting to be a comprehensive treatise upon the law of conversion should contain no reference to *Mulgrave v. Ogden* (1591) Croke, Eliz. 219; *Youl v. Harbottle* (1791) 1 Peake 49; *Gordon v. Harper* (1796) 7 Durn. & E. 9; *Keyworth v. Hill* (1820) 3 B. & Ald. 685; *Hollins v. Fowler* (1875) L. R. 7 H. L. 757; *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495, and that *Fouldes v. Willoughby* (1841) 8 M. & W. 540, should be mentioned only once, and then in a footnote. Evidently the author purposely slighted the historical aspect of the subject. On the other hand, there are comparatively few references in the footnotes to the recent American decisions. If the purpose of the author was to confine his efforts to making an exhaustive collection of the American decisions, and to arranging them in a convenient form for the practicing lawyer, it would seem that he would have included more cases which have been decided within the past ten years. The work evidences only a slight attempt to analyze the material collected, and to justify or explain the rules of law stated. While the book possesses a certain degree of usefulness in that it furnishes a lead to ascertaining the state of the law on many questions relating to conversion, it is regrettable that the author did not make better use of his opportunity.

Young B. Smith.

INCOME TAX LAW AND ACCOUNTING. 1918. By GODFREY N. NELSON. New York: MACMILLAN Co. 1918. pp. xxiv, 364.

INCOME TAX PROCEDURE FOR 1918. By ROBERT H. MONTGOMERY. New York: RONALD PRESS Co. 1918. pp. x, 800.

In 1917, 362,970 individual returns were subject to the Federal Income Tax. With the new minimum limits as established by the Act of October 3, 1917, this number will be enormously increased. There can be expected at once a great increase in the attention that is paid to the details of the law by the public at large, not only because they have their own personal interest to attend to, but because they know now that there is such a thing as an income tax.

Mr. Nelson's book probably was not intended to, and will not, appeal to anyone who is not concerned in making out a return. It has been held so and so, and the law provides such a thing. The method of treatment is adequate and the book will serve a useful purpose to a large number of persons who wish to make out their own return or the returns of a clientele who have not large sums at stake. Save for the inclusion of the New York State Income Tax on manufacturing and mercantile corporations, the subject matter is entirely federal. The only space devoted to anything but exposition of the details of the various laws is a chapter on "Bookkeeping Suggestions" which ought to be valuable for future returns.

But the volume that Mr. Montgomery has produced commands a broader horizon. A person who has a large income subject to taxation, or his lawyer, is not going to be content to take even a Treasury Decision at its face value. Nor will he accept an assessment or acquiesce to the refusal of a deduction until he is familiar with all the considerations involved. To such a man, the Income Tax Procedure will prove invaluable. The Income Tax Service of the Corporation Trust Company may be said to be absolutely complete, but that only pretends to give what has been decided. Mr. Montgomery's constant purpose is to put before the reader something more than "what is being done". You ought to do this or to do that, in spite of the regulations or the law as it stands to-day, for the following reasons. The reader can agree with the reasons or not as he sees fit, but at least he appreciates that there is an issue of some kind. The running comments continue throughout the whole book, framed in a style much more refreshing than that usually associated with a C. P. A. But in a larger way is the book valuable: in itself it is a liberal education on the subject of the income tax. Continually is the reader being told that this part of the statute or this administrative regulation is wrong, or this one is sound, or that the law should be so and so. Anyone who believes that the principle of the income tax is fundamentally sound must wish to see all of the inequitable features of the law eliminated, thus making it an effective revenue producer with a minimum of friction and injustice. The income tax is no longer a theory but a condition, and must be worked out with the hearty cooperation of the men who are actually working with the law. Therefore, constructive ideas embodied in a manual that will be in the hands of such men will receive closer attention, than they would if they appeared in any other form.

BOOKS RECEIVED.

HANDBOOK OF CRIMINAL PROCEDURE. By WILLIAM L. CLARK, JR. 2nd Edition. By WILLIAM E. MIKELL. St. Paul: WEST PUBLISHING CO. 1918. pp. xi, 748.

THE ATLANTIC PORT DIFFERENTIALS. By JOHN B. DAISH. Washington: W. H. LOWDERMILK & Co. 1918. pp. xix, 524.

THE LAW RELATING TO TRADING WITH THE ENEMY. By CHARLES HENRY HUBERICH. New York: BAKER, VOORHIS & Co. 1918. pp. xxxiii, 485.

AMERICAN CITY PROGRESS AND THE LAW. By HOWARD LEE MCBAIN. New York: COLUMBIA UNIVERSITY PRESS. 1918. pp. viii, 269.

CRIMINOLOGY. By MAURICE PARMELEE. New York: MACMILLAN CO. 1918. pp. xiii, 522.

THE PETITION OF RIGHT. By FRANCES HELEN RELF. Minneapolis: UNIVERSITY OF MINNESOTA. 1917. pp. v, 74.

GUIDE TO THE LAW AND LEGAL LITERATURE OF ARGENTINA, BRAZIL, AND CHILE. By EDWIN M. BORCHARD. Washington: GOVERNMENT PRINTING OFFICE. 1917. pp. 523.

COPYRIGHT DECISIONS, 1914-1917. Copyright Office Bulletin No. 18. Washington: GOVERNMENT PRINTING OFFICE. 1918. pp. ix, 605.

REPORTS OF THE AMERICAN BAR ASSOCIATION. Vol. XLII. 1917. Baltimore: LORD BALTIMORE PRESS. 1917. pp. 970.

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INSURABLE INTEREST IN LIFE.

Has an adult an "insurable interest" in the life of his aged parent? In several states, the answer would be affirmative;¹ in perhaps a greater number of states, the contrary conclusion would be reached.² To what extent is a man restrained by rules of law from procuring a policy upon his own life and making it payable to anyone whom he may choose, either by original designation of such person as beneficiary, or by subsequent assignment?³ The answer is obscure in result, unintelligible in reasoning.

Is life insurance an "indemnity" contract? "A contract of life insurance is one of indemnity", declared the Kentucky Court of Appeals.⁴ "A policy of this kind is not regarded as a mere contract of indemnity. Indeed, I am entirely unable to see how, upon principle and in the nature of things, it can be regarded as a contract of indemnity at all" is the view of a New York court in a leading case of creditor insurance.⁵ Upon these and other questions of insurable interest in human life, there exists great diversity of

¹*Woods v. Woods' Adm'r.* (1908) 130 Ky. 162, 113 S. W. 79; *Reserve Mut. Life Ins. Co. v. Kane* (1876) 81 Pa. 154; *Crosswell v. Connecticut Indemnity Ass'n.* (1897) 51 S. C. 103, 28 S. E. 200; *Farmers' and Traders' Bank v. Johnson* (1902) 118 Iowa 282, 91 N. W. 1074; *Loomis v. Eagle, etc., Ins. Co.* (1856) 72 Mass. 396 (*semble*).

²*Guardian, etc., Ins. Co. v. Hogan* (1875) 80 Ill. 35; *People's Mutual Benefit Society v. Templeton* (1896) 16 Ind. App. 126, 44 N. E. 809; *Life Ins. Clearing Co. v. O'Neill* (C. C. A. 1901) 106 Fed. 800; and see note in 54 L. R. A. 231, *et. seq.*

³For example, see the collections of cases on assignments in 3 L. R. A. (N. S.) 934; 6 *ibid.* 128, note.

⁴*Adams' Adm'r v. Reed* (Ky. 1894) 36 S. W. 568. Opinion withdrawn in (1896) 38 S. W. 420.

⁵*Rawles v. American Life Ins. Co.* (N. Y. 1862) 36 Barb. 357. That creditor insurance is "indemnity", see *Wash. Central Bank v. Hume* (1888) 128 U. S. 195, 205, 9 Sup. Ct. 4, *per Fuller, C. J.*; *Exchange Bank v. Loh* (1898) 104 Ga. 446, 31 S. E. 459, *per Lumpkin, J.*

judicial opinion. Nor are the text writers agreed.⁶ Since life insurance is an every day commercial transaction, a rule of certainty is highly desirable. In the following pages, an effort will be made to trace some of the sources of confusion and to analyze a few of the basic problems of the subject.

The typical life insurance policy is a unilateral contract whereby the insurer, in consideration of the payment of the first premium, promises the insured that he will pay a sum certain to the beneficiary upon certain conditions, chief of which are the payment of the second and successive premiums during the life of the *cestui que vie*, and the death of the *cestui que vie*.⁷ Experience has demonstrated that the "level premium" plan, or plan of equal annual installments throughout the life of the policy, is the only safe one, and practically all of the business is now done in this way.⁸

Actuarial calculations, based upon a vast number of observed instances, find with precision the ratio of probability that any individual insured at a certain age, will die at any particular year thereafter. Obviously, the ratio increases with advancing years. The "natural premium," or the amount to be exacted from each individual of a certain age to pay the insurance of all persons of that age dying during a certain year, would be very light during the years twenty to thirty, and almost prohibitive during the years fifty to sixty. Under the level premium plan, the insurer receives from the insured in the earlier years the natural premium plus a deposit to be used in covering a portion of the natural premiums of later years. Thus, the policy becomes an investment, the deposit being the basis of the surrender value.⁹ In

⁶Mr. Richards thinks life insurance is always an indemnity transaction. Richards, Insurance (3rd ed.) § 24. Professor Vance regards it as "principally a contract of investment." Vance, Insurance 102. Mr. Cooke agrees with neither. Cooke, Life Insurance (1st ed.) § 58.

⁷It seems preferable to regard the payment of the second and following premiums as a condition rather than a part of the consideration. Richards, Insurance (3rd ed.) 89. The term *cestui que vie* is used to designate the person upon whose life the policy is written, in order to differentiate such person from the promisee in the policy. Of course, the same person may be named as *cestui que vie*, insured, and beneficiary in the same policy, though in such case the real beneficiary will be the estate of the insured.

⁸Fraternal insurance is beyond the scope of this discussion, although most fraternal insurance now conforms more or less to the level premium plan.

⁹Many other factors enter into the calculation of premiums, but the investment feature is substantially as described. " * * * the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy,

respect to this investment value the insured's claim is not unlike that of a bank depositor or other holder of a chose in action. Moreover, since the annual premium necessarily includes a "loading charge" to cover the company's expenses, the total of premiums paid plus the interest thereon will normally exceed the face value of the policy. It is only by the premature death of the *cestui* that a profit may be made upon the policy.¹⁰ Hence, unless the insured or beneficiary (whoever pays the premiums) has some exceptional prescience as to the probable death of the *cestui que vie*, the former may contemplate at the inception of the policy that the beneficiary will receive somewhat less from the investment than is put into it in the way of premiums, adding interest on the premiums.¹¹ In this aspect life insurance resembles a saving device, and does not offer any alluring prospect of a speculative return.

English law does not attempt to formulate the objects or purposes for the accomplishment of which a contract may be made. In the case of simple contracts, a consideration must be found affirmatively to exist. In this, however, there is no limitation upon the purposes for which contracts may be made. Consideration is an entirely unmoral requirement; that is, a contract upon a technically sufficient consideration may or may not be entered into with a meritorious object in view. Thus, the effect of contractual purpose must be sought elsewhere than in the formal requirements of contractual liability.

This may be expressed in another way by saying that the traditional attitude of English courts favors "freedom of contract". "Freedom" as used here means freedom as to the objects and purposes of contracts. In choosing from the vast number of promises made by and between persons in society, those to which the law will attach its sanction, our law has never formulated any requirement that a promise must be shown to have been entered into with a meritorious object in view. Rather it has chosen to recognize as enforceable all promises made upon a consideration, with certain exceptions.

"In classifying Contracts in the manner above adopted, it is to be remembered that a State may

an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy." Brown, J., in *In re McKinney*, (D. C. 1883) 15 Fed. 535, 537.

¹⁰Richards, Insurance (3rd ed.) 29 n. 1, 39.

¹¹See the statement of Brown, J., in *In re McKinney*, *supra*, footnote 9, at p. 538.

recognize the Contracts of its citizens by the assumption of two different principles. It may either Presume that every object for which its citizens may make a Contract is a justifiable one, and may only except a few distinct classes of objects expressly named, on the ground of their immorality, their uncertainty, or their supposed inconsistency with the well-being of the State. It is on this principle that modern States mostly proceed, and that the Law of England attaches varying degrees of Invalidity to Contracts made in contemplation of a future Breach of Conjugal Duty, of a Breach of the Criminal Law, or of Fraudulent Evasion of other parts of the Law; * * * of the uncertain issue, as by the way of Assurance, of certain Sports and Games of skill; of the fluctuation of the Stock Exchange; and all the class of Contracts said to be In Restraint of Trade."¹²

It is true that the *laissez-faire* doctrine of the eighteenth and nineteenth centuries loses caste when confronted with the perplexing problems of modern complex industrialism, and that in respect to many contractual relationships, "freedom of contract" has become but a shadow of its former self; as in the case of contracts between carrier and passenger, carrier and shipper, employer and employee, and contracts between mortgagor and mortgagee limiting the equity of redemption.^{12a} In most of these instances, however, the inquiry is not as to the object of the contract but as to whether or not the parties were on an equal footing; the law coming to the rescue of those persons who are at a disadvantage in driving a fair bargain. But with regard to contractual purpose, freedom of contract is still the basic principle. The law might refuse to attach its sanction to any transactions except those affirmatively shown to have been entered into in furtherance of some useful social or economic purpose; but that is not, it is submitted, the law to-day. On the other hand, proof that a contract is one, or one of a class, which has a harmful social or economic tendency will render it nugatory on grounds of public policy.¹³ The list of objects or purposes which have this

¹²Amos, Science of Jurisprudence 228; see also Amos, Science of Law 193, 194; Davis v. Brown (1903) 159 Ind. 644, 65 N. E. 908.

^{12a}See Dean Pound, "The End of Law", 27 Harvard Law Rev. 196-198, 228-230.

¹³The tendency of a contract may be vicious from the standpoint of public interest, though the individual purpose was subjectively innocent. The law's standard of harmfulness is the objective tendency or result. See *infra*, p. 386.

tendency is not limited, but may be indefinitely extended as occasion requires.¹⁴

Two objections have been urged to the indiscriminate enforcement of life insurance contracts: First, that they are wagering contracts; second, that they tend to encourage the taking of human life.

At the outset it is necessary to determine the sense in which the term "wager" is used. It may have an equivocal or a sinister meaning, depending upon whether regard is had to the form of the agreement, or to its object. The essentials of a wager, as set forth by Hawkins, J., in *Carlill v. Carbolic Smoke Ball Co.*¹⁵ are: (1) A mutual agreement of two that according to the issue of a future uncertain event, one shall receive from the other a stake; (2) the necessity that each party shall either win or lose; (3) that neither party shall have any interest other than the stake he is to win or lose; (4) mutuality of intent as to hazard. On the other hand, Anson defines a wager as "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event."¹⁶ The latter definition ignores the third essential of the former, namely, the absence of any interest in the event other than the stake to be won. Anson was looking solely to the form of the agreement, while Hawkins, J., was attempting to frame a definition which would cover the object of the agreement as well as its form. Thus, a marine insurance policy and a bet upon a horse-race are alike in the sense that each is a promise to pay money upon the happening of an event which may or may not occur.¹⁷ A consideration of the objects or purposes of the two agreements, however, shows that the resemblance is only superficial. The purpose of the promisee in making the bet is to gain by the transaction; the purpose of the promisee in procuring the marine policy is to lessen the hardship from his misfortune in losing his ship. Since the promise is to pay the amount of loss sustained, this is the only purpose (barring fraud) which the insured can have in taking out such a

¹⁴"We have the possibility of immense development along the line of public policy as limiting the right to make valid contracts. In the constitutional development of the United States, it is especially important to hold to this element of flexibility, as it is only through this flexibility that we can solve the problems brought us in economic development." 2 Ely, Property and Contract in their Relation to the Distribution of Wealth 572.

¹⁵[1892] 2 Q. B. 484.

¹⁶Anson, Contracts (8th Am. ed. by E. W. Huffcut) 228.

¹⁷See *ibid.* 230.

policy. Such a purpose—to lessen hardship from pecuniary misfortune—may be called an “indemnity purpose”.¹⁸ Here the “insurable interest” of the insured is his maximum possible pecuniary loss from the happening of the event.

But what is the basis for distinguishing between these two purposes? Is it reprehensible to make contracts for the purpose of gaining money? To answer these questions, we must look beyond the individual purpose to the social consequences which such contracts tend to produce; and that purpose, when so regarded, is no better than these consequences. Thus, the substantial difference between the gaming contracts and the indemnity contracts is in the object or tendency which each class has. Mr. Anson’s definition, which avowedly ignores this difference, does not give the term “wager” much practical value. The word “aleatory” may be used to describe contracts which are “wagers” in the sense referred to by Anson.¹⁹ Moreover, “wager” has come to have a sinister significance when used by American courts, especially in insurance cases, and this meaning seems preferable. A wagering contract, then, is an aleatory contract which has a harmful tendency.

To a wagering contract, as thus defined, the chief objection is that it leads to an unearned gain—“unearned” in the sense that wagering is not socially productive.²⁰ It is difficult to define the objection, and it has seldom undergone judicial analysis. The harmful social consequences are numerous. Vaguely, a sense of antagonism is aroused in a community of workers against persons who obtain a means of livelihood without participating in the machinery of social or economic production and distribution—in short, against “social slackers”. More specifically, unearned gains lead to idleness, and the wagerer becomes a social parasite. Useful business and industry are thereby discouraged. On the moral side, idleness leads to vice; and the impoverishment of the loser entails misery, and, in consequence, crime.²¹

¹⁸Many transactions which are not indemnity contracts may be for an indemnity purpose. For example, a man may deposit money in a savings bank for the purpose of lessening his hardship from loss of employment, sickness, *etc.*; yet the bank’s promise to pay the amount of his deposit is surely not an indemnity contract.

¹⁹For an explanation of “aleatory”, see Vance, Insurance 46.
²⁰“* * * the individual may acquire things though he may not produce them for the good of society. The gambler may acquire, but socially the work of the gambler is destructive and not productive.” 1 Ely, *op. cit.* 277.

²¹See the remarks of Sedgwick, J., in *Amory v. Gilman* (1806) 2 Mass. 1, at p. 11, and the remarks of the court in *Burbage v. Windley* (1891) 108 N. C. 357, 12 S. E. 839; see also, 1 Marshall, Insurance 95.

The scope of the term "unearned gain" is primarily a question for the social sciences. Still, when the occasion arises, the courts must draw the line. Thus, a contract for the buying and selling of stock or produce is valid if entered into with a contemplation of performance by actual delivery, yet is void if entered into with no intention of delivery.^{21a} The important thing to be noticed, however, is that not every unearned gain is forbidden by the policy of English law. The descent of property to the heirs or next of kin of the decedent represents an unearned gain as to the former;²² yet as an encouragement to industry, as a means of preserving the family, and as a solution of a bad dilemma, the rule is allowed to stand.^{22a} The most conspicuous class of cases is gifts, whether by devise, *mortis causa*, or *inter vivos*. Freedom of gift is one of the incidents of property in English law, yet it has not been won without a struggle²³ and its extension has been criticised.²⁴ However, the tendency, with few exceptions, has been toward greater freedom of alienation.²⁵ These observations will be seen to have some bearing upon the freedom allowed in procuring and transferring life insurance policies.

There are two differences, however, between a gift and a wagering contract: First, the donee has usually little initiative in procuring the gift, and hence the procuring of gifts does not open up an attractive means of acquiring a livelihood without industry. Whenever the procuring of gifts is sought to be used as a vocation, it is discouraged, as in the case of professional beggars. On the other hand, if wagering were unrestrained by law, the initiative in procuring the unearned gain would be open to everyone, and gambling would become an attractive means of livelihood. Secondly, the impoverishment of the loser in a wager has no counterpart in the case of a gift. It may be, too, that a greater necessity is felt for freedom of alienation as a necessary incident to a

^{21a}Anson, *op. cit.* 237, n. 1; Williston's Wald's Pollock on Contracts (3rd Am. ed.) 408, n. 63.

²¹Ely, *op. cit.* 397.

^{22a}See 1 Ely, *op. cit.* 425, *et seq.*

²²Gray, *Restraints on Alienation* (2nd ed.) §§ 4, 5, 6.

²⁴"If the right of gift to others than offspring had to be decided upon from an expediency point of view, strong reasons might be assigned for concluding that unrestrained giving should not be allowed. One who duly weighs the evidence * * * will be inclined to think that more misery is caused by charity (wrongly so-called) than by all the crimes which are committed; and will perhaps infer that benefit would result if almsgiving were forbidden." Herbert Spencer, *Justice* 119.

²⁵Gray, *op. cit.*, §§ 3, 4.

property right, than for freedom of contract; but the distinction, if any, is a subtle one.

If, then, the initiative in procuring life insurance contracts is taken away from the persons who may gain by them, the making of such contracts cannot become a vocation and their harmful tendencies will either disappear entirely or will, at the very least, be reduced to an extent as inconsiderable as in the case of gifts. More specifically, the evil tendency of such contracts, so far as wagering is concerned, will be removed if the beneficiary is deprived of the initiative in making the contract.

Marine and fire insurance contracts are indemnity contracts for the reason that the promise is to pay the amount of loss and hence the only conceivable purpose is the indemnity purpose. No unearned gain can result to the insured because the amount payable can never (in theory, at least) exceed his "insurable interest". The same cannot be said of the ordinary life insurance policy, for it is a promise to pay a fixed sum of money, not measured in terms of the hardship or loss occasioned by death. It is, therefore, a misnomer to call it an "indemnity" contract. There seems to be no inherent reason why people should not make indemnity contracts—contracts to pay the amount of pecuniary loss—against loss by death; but practically, it is not done.²⁶

It is frequently assumed that all "aleatory" contracts are either indemnity contracts or are to be condemned. *Non sequitur* as to life insurance contracts. The latter may be used for an indemnity purpose—that is, to alleviate the beneficiary's suffering from pecuniary loss by the death of the *cestui que vie*—and if the beneficiary's maximum pecuniary loss at least equals the amount of the insurance in his favor, no unearned gain will result. Furthermore, a life policy may also be used as an investment-gift, as where the person who procures the policy and pays the premiums names as beneficiary a friend, for the purpose of making a gift.²⁷

²⁶The argument that the present form of life insurance contracts is due to the fact that the value of a human life cannot be measured (see Richards, *op. cit.* § 24) is surely not conclusive in view of the practice under some wrongful death statutes; yet no doubt, as a practical matter, the uncertainty of a jury's measurement has made it inexpedient for insurance companies to issue strict indemnity policies.

²⁷Mr. Richards says: "* * * insurance is essentially a contract of indemnity", and adds: "By this proposition is meant that the object sought to be accomplished by the contract of insurance must be protection against a real loss to an insured interest, not that the measure of indemnity allowed must be exactly commensurate with the loss." Richards, *op. cit.* § 24, and p. 27, n. 1. He is speaking here of all insurance, including life insurance. If, as asserted here, "protection against loss" (lessening the hardship from

Obviously, no indemnity purpose is present here, for the friend, it is assumed, will not sustain any pecuniary loss by the death of the *cestui que vie*. As is the case with other gifts, an unearned gain will result to the beneficiary; yet such contracts are harmless because the beneficiary does not take the initiative in procuring the policy. Pursuing the policy of freedom of contract and freedom of gift, the law should not deny such a contract its sanction. Again, a life policy may be procured with both these objects in view, as where a man procures a policy in favor of his wife. Here the indemnity purpose may, it seems, be ignored, for the courts will not inquire as to the beneficiary's maximum possible pecuniary loss, but will sustain the policy on other grounds.²⁸ Likewise, a life insurance contract may be an investment-exchange. In this aspect, its validity will be dealt with later. Finally, a life insurance contract may be used as a pernicious wagering device. It will be a wager whenever both these conditions exist: (a) The beneficiary may freely take the initiative in procuring the contract, and (b) the beneficiary has no interest in the life insured.

The second objection to insurance contracts has been less emphasized by the courts than the first.²⁹ Every life insurance contract in which the insured and the beneficiary are not the same person creates a temptation to the beneficiary to murder the insured, in the sense that the opportunity for gain exists if only the crime can be concealed. Unless this temptation is outweighed by some stronger counteracting motive, the contract has a decidedly harmful tendency. What safeguards does the law employ for the purpose of raising a counteracting motive? First, the criminal law, which deals severely with murder. Second, the well established rule that the beneficiary who murders the *cestui que vie* cannot recover and keep for his own benefit the proceeds of the policy.³⁰

loss) is only *one* of the rational and harmless objects for which life insurance contracts may be made, it seems improper to class them as "indemnity contracts" once and for all—especially as we are obliged to add in the next breath that the law does not apply to them the legal principles of subrogation and contribution, Richards, *op. cit.* §§ 51, 52, which are peculiar incidents of indemnity contracts and which, as Mr. Richards says, arise "from this cardinal principle" that insurance is an indemnity contract.

²⁸See *infra*, p. 397.

²⁹"Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder but the fact that such wagers came to be regarded as a mischievous kind of gaming. Stat. 14 Geo. III. c. 48."—Holmes, J., in *Grigsby v. Russell* (1911) 222 U. S. 149, 156, 32 Sup. Ct. 58.

³⁰*Mutual Life Ins. Co. v. Armstrong* (1886) 117 U. S. 591, 598, 6 Sup. Ct. 877; *Cleaver v. Association* [1892] 1 Q. B. 147; *Prince of Wales, etc.*,

Are these safeguards sufficient? One writer has boldly contended that they are, and that because of this fact alone, the requirement as to insurable interest is artificial, technical and absurd.³¹ Mr. Cooke bases his argument upon the supposed analogies of descent to heirs and of devises or bequests. The difference, however, between the two classes of cases is that the beneficiary may (unless restrained by some such rule of law as that against which Mr. Cooke is leveling his criticism) on his own initiative create the situation by which his crime may become fruitful, whereas the heir or devisee may not. A more apt analogue would be the sale of a remainder after a life estate,³² or better still, the sale of an expectancy by an heir—a class of cases in which no emphasis has been placed upon the temptation of the vendee to murder the ancestor in order to hasten his enjoyment of the property.³³ It is true that the consent of the ancestor is generally required, but this is upon the ground that otherwise the transaction would be a fraud upon the ancestor, and the temptation to crime seems never to have been emphasized in this connection.³⁴ Still another class of transactions is analogous. Courts of equity in recent years have been quite liberal in the enforcement by a decree for specific performance of contracts whereby A in consideration of B's living with A during the remainder of A's life, or of B's supporting A during the remainder of A's life, promises to leave property to B at his (A's) death.³⁵ It is obvious that the opportunity to accelerate B's enjoyment of the property by compassing the death of A affords a strong temptation to B to commit the crime; yet there does not appear to be any case in which the court has refused to enforce the contract because of this possibility.

Ass'n Co. v. Palmer (1858) 25 Beav. 605; *Filmore v. Metropolitan Life Ins. Co.* (1910) 82 Oh. St. 208, 92 N. E. 26; *Anderson v. Life Ins. Co.* (1910) 152 N. C. 1, 67 S. E. 53; *New York Life Ins. Co. v. Davis* (1899) 96 Va. 737, 32 S. E. 475. The cases are collected in 3 L. R. A. (N. S.) 726, note; and L. R. A. 1917 B. 671, note. The purpose of the rule is shown in the fact that if the beneficiary is insane when he murders the *cestui que vie*, *Holdom v. Ancient Order, etc.* (1895) 159 Ill. 619, 43 N. E. 772, or commits the homicide carelessly but not intentionally even though the beneficiary is convicted of manslaughter, *Schreiner v. High Court* (1890) 35 Ill. App. 576, the beneficiary is not on that account denied recovery.

³¹Cooke, *Life Insurance* (1st ed.) §§ 58, 59.

³²See the remarks of Holmes, J., in *Grigsby v. Russell*, *supra*, footnote 29.

³³W. Allen, J., in *Mutual Life Ins. Co. v. Allen* (1884) 138 Mass. 24, 30.

³⁴The cases are collected in a note in 33 L. R. A. 274.

³⁵See, for example, *Howe v. Watson* (1901) 179 Mass. 30, 60 N. E. 415. Numerous similar cases are collected in 1 Ames, *Cases on Equity* 303, n. 2, and in 44 L. R. A. (N. S.) 733, note, and 44 L. R. A. (N. S.) 756, note.

Between the life insurance contract, if unrestricted, and each of the above transactions except the remainder after a life estate, there exists, however, this distinction: In the latter cases the person (A) whose death will be profitable to another (B) consents to the creation of the legal situation out of which the temptation to kill arises, and thereby exercises a *delectus personae* as to the person (B) who shall have this opportunity to gain by encompassing his (A's) death, whereas if the making of life insurance contracts is to be unrestricted, as urged by Mr. Cooke, B may, without A's knowledge or consent, upon his own initiative create the situation which will make A's premature death profitable to him. The distinction seems a substantial one. While it is true that it seems to have been ignored in the case of remainders after life estates (*e. g.* where A has a life estate and X the remainder, X may sell his interest to B without A's knowledge or consent, thereby affording B an opportunity to gain by A's premature death), the explanation is probably an historical one. The case may be regarded as an instance of that "freedom of alienation" which is considered an indispensable incident of a property right; that is, the harmful tendency of the transaction from B's standpoint is outweighed by the desirability, from X's standpoint, of allowing him to dispose of his property. No such reasoning is applicable to the formation of life insurance contracts, though a similar argument exists in favor of the assignability of contracts once made.

It cannot be doubted that the law would be tolerating a very substantial evil if "the whole world of the unscrupulous" (to use Mr. Justice Holmes' phrase)³⁶ were free to bet upon what life they choose. Some safeguard is necessary in order to reduce this evil to a negligible minimum. The transactions above mentioned (sale of an expectancy, and promise to devise property in consideration of support during the promisor's life) afford one instance of a sufficient safeguard, the consent of the *cestui que vie*. So also, A's consent that B may become the beneficiary in a policy upon A's life reduces to a negligible minimum the tendency of such a contract to bring about murder. The instinct of self-preservation is one of the most powerful of psychological forces.³⁷ If, then, the *cestui que vie* is *sui juris* and is intelligently cognizant of

³⁶In *Grigsby v. Russell*, *supra*, footnote 29, at p. 155.

³⁷Jhering, *Der Zweck im Recht* (Leipzig—1839) p. 455. He considers the danger of self-destruction to be negligibly small ("verschwindend klein.")

the nature of the transaction and of the possibility that the beneficiary may profit by his death, the consent of the *cestui que vie* affords sufficient assurance that the beneficiary will be a person who may safely be entrusted to resist the temptation to murder. The law cannot make a better choice of beneficiary than can the *cestui que vie*. Moreover, such a *delectus personae* makes "a roughly selected class of persons who by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death."³⁸ It is obvious, however, that this reasoning (from the instinct of self-preservation) will be inapplicable where through infancy, insanity, duress, deception or pure ignorance, the consent of the *cestui que vie* is not an intelligent consent or is not a real consent; and hence these abnormal cases must be dealt with on a different footing.

The consent of the *cestui que vie* is not the only means by which the temptation to murder may be counteracted. Where the beneficiary's gain from the policy is substantially equalled by a corresponding loss produced by the death of the *cestui que vie*, the actual tendency to produce homicide is reduced to a negligible minimum. So, too, where from any other cause the beneficiary has an unusually strong motive for desiring the preservation of the life insured. Thus, the second objection to life insurance contracts is met when either (a) the *cestui que vie* gives his intelligent juristic consent to the naming of the beneficiary; or (b) the beneficiary has a sufficiently powerful motive, pecuniary or otherwise, for desiring that the death of the *cestui* should not occur.

It was the wagering aspect of insurance which gave the English courts the most trouble. Wagering contracts were valid at common law, and, in spite of the opinions to the contrary³⁹ the same was true of wagering contracts of insurance as well as of other wagering contracts.⁴⁰ The English judges were openly hostile to pure wagers, and did everything possible to discourage their enforcement, short of declaring them invalid.⁴¹ Thus, in the famous

³⁸Holmes, J., in *Grigsby v. Russell*, *supra*, footnote 29 at p. 155.

³⁹See for example, *Ruse v. Mut., etc., Ins. Co.* (1861) 23 N. Y. 516; *Grens v. Traver* (1914) 148 N. Y. Supp. 200; *Singleton v. Insurance Co.* (1877) 66 Mo. 63.

⁴⁰*Trenton Mut., etc., Ins. Co. v. Johnson* (1854) 24 N. J. L. 576; *Dalby v. Life Assurance Co.* (1854) 15 C. B. 365; note, 57 Am. Dec. 93; *Vance, Insurance* 125.

⁴¹"It seems that the idea that a contract must not be contrary to public policy arose out of the effort of the judges to prevent the admission of wagers in the common law as legal contracts." 2 Ely, *op. cit.* 570. See also *Pollock, op. cit.* 421.

case of *Da Costa v. Jones*,⁴² wherein it was sought to recover upon a wager upon the sex of a certain person, Lord Mansfield refused to receive the plaintiff's evidence on the ground that it was indecent; but when confronted with numerous cases in which similar evidence had been received, he declared that such evidence would be received when offered *for a proper purpose*. The true objection was not to the nature of the evidence but to the purpose of the contract. In *Gilbert v. Sykes*,⁴³ a suit upon a wager upon the life of Napoleon I, the court was driven to equally fatuous explanations of its refusal to hear the plaintiff's case.

Fearful that "public policy" would prove a dangerous innovation upon the law of contracts,⁴⁴ the English courts were unable to cope with the problem until the legislature came to their aid and substituted for the old problem a new one. The new problem was the interpretation of the statute of 14 Geo. III, c. 48 (1774), which regulates insurance "on the life or lives of any person or persons, or on any other event whatsoever". The statute was equally applicable to both life and fire insurance.⁴⁵ Section I provided that no insurance of the kind designated (excepting marine insurance, which was expressly excepted by section IV of the statute) should be made "wherein the person or persons for whose use, benefit or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering"; and section III provided

"in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives or other event or events."

This enactment was unscientific and confusing in that it sought to regulate in identical terms widely different classes of contracts. As has been demonstrated, fire insurance is in form an indemnity

⁴²(1778) Cowper 729.

⁴³(1812) 16 East 150.

⁴⁴See the remarks of Burroughs, J., in *Richardson v. Mellish* (1824) 2 Bing. 229, 252; see also Holland, *Jurisprudence* (10th ed.) 268.

⁴⁵In the annotation to this statute in 6 Chitty, *English Statutes* (6th ed.) 296 n. (v) it is said: "It has never been doubted but that it applies to fire insurance policies." See Bunyon on *Fire Insurance* (5th ed.) p. 33. Though the statute has been held applicable to wagers on other events, *Paterson v. Powell* (1832) 9 Bing. 320; *Roebuck v. Hammerton* (1778) 2 Cowp. 737, no case has been found in which it was applied to fire policies—probably because it was settled before the statute was passed that fire insurance is indemnity. *Sadler Co. v. Badcock* (1743) 2 Atk. 554.

contract, and the consequences of section III would follow from the fact that the agreement is to pay an amount to indemnify for *loss* sustained by the insured, which can obviously be no greater than his interest. Life insurance, on the other hand, is not in form an indemnity contract at all, and may or may not be used for the purpose of furnishing indemnity.⁴⁶ At first it was thought that the statute required that the insured should have an "interest" at the death of the *cestui que vie* as well as at the inception of the policy,⁴⁷ but it was perceived nearly a half century later that this interpretation would lead to great hardship if rigidly enforced, and, the insurance companies having declined to take advantage of it, the court held in *Dalby v. Assurance Co.*⁴⁸ that as applied to life insurance the statute required an "interest" only at the inception of the policy. Even this pious misconstruction (for such it seems to be)⁴⁹ of the statute did not serve to eliminate all of its evils, for the courts were obliged to hold that the "interest" of the insured must be of a pecuniary nature. Thus, the strong ties of affection existing between father and son were held to give the former no insurable "interest" in the life of the latter,⁵⁰ nor was a "reasonable expectation of pecuniary advantage" sufficient, as where a creditor gratuitously promised to forego the collection of his debt.⁵¹ The case just cited affords an illustration of the inconsistencies into which the English courts were led, in attempting to apply the principle of indemnity to life insurance. The insured had a contract with the *cestui que vie* whereby the latter agreed to employ the former for five years at a salary of

⁴⁶*Cf.* Richards, Insurance (3rd ed.) § 24.

⁴⁷*Godsall v. Boldero* (1807) 9 East 72.

⁴⁸*Supra*, footnote 40.

⁴⁹It is submitted that the *Dalby* decision, though reaching a desirable result, is a strained construction of the language of the statute. It is unfortunate, to say the least, whenever a statute produces diametrically opposite effects as applied to two subjects governed by the same language. "This section is construed differently in the case of life insurances and fire insurances." 6 Chitty, English Statutes (6th ed.) 299, n. (a). See also Porter, Insurance 13. In an address before the Law Society at Birmingham, England, on October 1, 1908, Mr. H. Kingsley Wood, discussing "Insurable Interest", and advocating an extensive revision of the statute (14 Geo. III. c. 48) said: "It might be advisable to deal with life assurance separately and specially from other branches of insurance * * *." 125 Law Times 547.

⁵⁰*Halford v. Kymer* (1830) 10 Barn. & C. 724; *Worthington v. Curtis* (1875) 1 Ch. Div. 419 (*semble*).

⁵¹*Hebdon v. West* (1863) 3 Best & S. 579, where the court held that such gratuitous promise gave the debtor no insurable interest in the life of the creditor, saying that the promise was "without any consideration or any circumstance to make such a promise in any way binding".

£600 per year, and took one policy for £5,000 and another £2,500. The indemnity principle was carried out to the extent of holding that the insured could recover no more on *both* policies than the value of his interest, and yet the court figured that interest as £3,000, the total sum which the insured would receive under his contract of employment; though it seems clear that the amount of the insured's damage would be no greater than the damages recoverable for breach of the contract—a sum far less than £3,000. Such results are not surprising if one stops to consider the source of the confusion.

The majority of the states have adopted only such English statutes as were in force at a date long prior to 1774, and the Act of 14 Geo. III would have little bearing upon the present discussion were it not for the fact that the inconsistencies and subtle distinctions of the English cases have crept into our reports and created not a little confusion.⁵² In what is probably the earliest reported American decision upon insurable interest in lives,⁵³ no reference is made to the English statute, and the court discusses the question from the standpoint of public policy, with engaging candor. Other courts, shrinking from any innovation upon the doctrine of *stare decisis*, have striven to follow the English common law as it existed prior to the enactment of 14 Geo. III, with diverse results.⁵⁴ In the main, however, the American courts have not been timid about adopting public policy as the basis of insurable interest,⁵⁵ and if this be judicial legislation, it is not without precedent in the avowed hostility of the English courts toward wagering contracts. To summarize: The American courts are not, as a rule, hemmed in by the restrictive provisions of the English statute governing insurable interest; and by assuming a strong position upon the principle of public policy they have paved the way for a scientific treatment of the subject. A brief review of the leading groups of American decisions will demonstrate what progress has been made in this direction.

I. AT THE INCEPTION OF THE POLICY.

(a) *Consent of the Cestui Que Vie.*

⁵²See, for instance, the discussion in 57 Am. Dec. 93, 94, note; Rittler v. Smith (1889) 70 Md. 261, 16 Atl. 890.

⁵³Lord v. Dall (1815) 12 Mass. 118.

⁵⁴Cf. Ruse v. Ins. Co., *supra*, footnote 39; Singleton v. Ins. Co., *supra*, footnote 39; Bevin v. Connecticut Mutual Life Ins. Co. (1854) 23 Conn. 244; with Trenton, *etc.*, Ins. Co. v. Johnson, *supra*, footnote 40.

⁵⁵Richards, *op. cit.* 32.

A procures a policy of insurance upon his own life, and names as beneficiary B, who will suffer no loss through A's death. The almost universal tendency of recent decisions is to hold that B may receive and retain for his own benefit the proceeds of the policy.⁵⁶ In some instances the rule has been stated that "every man has an unlimited insurable interest in his own life"⁵⁷ and in others it is stated that the question of insurable interest is immaterial where the policy is procured by the *cestui que vie*.⁵⁸ This brings up the question as to the meaning of the term "insurable interest" as used in American law. If the phrase is used so as to include the advantage arising from the continuance of one's own life, then its meaning will be radically different from that in which it is employed in fire and marine insurance. On the other hand, if phrase is to be co-extensive with the definition given it in the other kinds of insurance, various non-pecuniary relationships between the *cestui que vie* and the beneficiary will be excluded. On the whole, it seems preferable to use the term as referring only to the "interest" of the beneficiary.⁵⁹ Where the *cestui* procures the policy, the question of insurable interest becomes immaterial, because the harmful tendencies of the contract are reduced to a negligible minimum. The consent of the *cestui* is a sufficient safeguard against homicide, and the fact that the *cestui* procures the policy deprives the beneficiary of the initiative and renders the non-productive gain to the beneficiary innocuous. Perhaps the clearest statement of the principle is to be found in *Johnson v. Van Epps*,⁶⁰ where the court says:⁶¹

"It would seem from the above authorities that where a person takes out an insurance upon his own life, for the benefit of some third person, who may not have an insurable interest in the life insured, the question whether it is a gambling or wagering policy, is in every case one for the jury to determine under proper instructions, and if it be found that *the insured*

⁵⁶*Dolan v. Supreme Council* (1908) 152 Mich. 266, 116 N. W. 383; *Scott v. Dickson* (1884) 108 Pa. St. 6; *Campbell v. New England Mut. Life Ins. Co.* (1867) 98 Mass. 381, 389; *Hardy v. Aetna L. I. Co.* (1910) 152 N. C. 286, 67 S. E. 767; *Vance, Insurance*, 127; *Richards, Insurance* (3rd Ed.) 50; 16 L. R. A. (N. S.) 555, note.

⁵⁷*Campbell v. Ins. Co., supra*, footnote 56, p. 389; *Richards, Insurance* (3rd ed.) 40.

⁵⁸*Vance, Insurance* 128.

⁵⁹*Vance, Insurance* 128.

⁶⁰(1883) 14 Ill. App. 201, aff'd. 110 Ill. 551.

⁶¹At p. 215.

has been the principal actor in the transaction, and has entered into it with an honest purpose to aid one whom he deems a proper object of his bounty, the transaction will be sustained and the beneficiary be entitled to the money; but, on the other hand, if it appear that the party insured is but a mere nominal party, and he procured the insurance for the purpose of giving the beneficiary the advantage of such insurance upon his life, when the beneficiary could not obtain it in his own name, the transaction will be condemned." (Italics ours.)

In *Deal v. Hainley*⁶² Goode, J., in passing upon a similar policy, declared that if the *cestui* "took the insurance on the inducement of defendant (the beneficiary, who had no insurable interest), who was the *active and moving party in the transaction*"⁶³ the policy was speculative" and void. In *Reed v. Provident Savings Life Assurance Society*,⁶⁴ Gray, J., in passing upon this question, said:⁶⁵

"If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy,—that is to say, a speculative contract—which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to anyone whom he may appoint or assign the policy to. What will distinguish the one contract from the other is *the fact as to the party actually contracting with the insurer* and the distinction is substantial and controlling accordingly." (Italics ours.)

If the *cestui* also pays the premiums, the transaction is an investment-gift—that is, a gift to the beneficiary of the investment made by the *cestui*. While gifts do not perform any useful function in trade or commerce,⁶⁶ the courts recognize the validity of such policies as incidental to freedom of gift. Thus, in *Johnson v. Van Epps*,⁶⁷ Pillsbury, J., says:

"* * * we adopt the rule heretofore stated by us, being, as we believe, more in accordance with that policy of the law which requires us, while recognizing

⁶²(1909) 135 Mo App. 507, 116 S. W. 1.

⁶³Italics are author's.

⁶⁴(1907) 190 N. Y. 111, 82 N. E. 734.

⁶⁵At p. 118.

⁶⁶Jhering, *op. cit.* 282.

⁶⁷*Supra*, footnote 60. At p. 217, 218.

and maintaining the interests of society, to interfere as little as possible with the liberty of the citizen to control and dispose of his own in good faith, for his own benefit in any manner he may see fit."^{67a}

In *Scott v. Dickson*,⁶⁸ one Dickson procured a policy of \$4,000 upon his life and at once assigned it to Scott, whom he declared to be "the best friend I have in the world." In sustaining Scott's right to the proceeds of the policy, Paxson, J., says:⁶⁹

"Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligations. And the fact that he continues to pay the premiums himself, and retains the control of the policy up to the time of his death, leaves no room for speculation."⁷⁰

The recovery by the beneficiary upon a policy of this sort is all but universally allowed.⁷¹

^{67a}To the same effect: *Mutual Life Ins. Co. v. Cummings* (1913) 66 Ore. 272, 133 Pac. 1169.

⁶⁸*Supra*, footnote 56.

⁶⁹At p. 16.

⁷⁰*Scott v. Dickson*, *supra*, footnote 56, was a case of an assignment. In general, assignments rest upon a slightly different footing; but where the assignment is made at the inception of the policy, and is merely a mode of naming the original beneficiary, the same principles are applicable as where the policy is made directly payable to the beneficiary, since the issuance of the policy and the assignment of it immediately afterwards constitute substantially but one transaction. *Parker, C. J.*, in *Steinback v. Diepenbrock* (1899) 158 N. Y. 24, 31, 52 N. E. 662.

⁷¹Among the recent cases which have approved this rule are: *Haberfeld v. Mayer* (1917) 256 Pa. 151, 100 Atl. 587; *Lee v. Equitable Life Ass. Society* (1916) 195 Mo. App. 40, 189 S. W. 1195 (*semble*); *Rupp v. Western Life Indemnity Co.* (1910) 138 Ky. 18, 127 S. W. 490; *s. c.* (1912) 147 Ky. 489, 144 S. W. 743; *Pacific Mutual Life Ins. Co. v. O'Neill* (1913) 36 Okla. 792, 130 Pac. 270; *Floyd v. Met. Life Ins. Co.* (1914) 28 Del. 51, 90 Atl. 404 (*semble*); *Langford v. Nat'l, etc., Ins. Co.* (1915) 116 Ark. 527, 173 S. W. 414; *New York Life Ins. Co. v. Murtagh* (1915) 137 La. Ann. 760, 69 So. 165; *American Nat'l. Ins. Co. v. Moore* (1915) 14 Ala. App. 413, 70 So. 190, *aff'd. Ex parte American Nat'l. Ins. Co.* (1916) 195 Ala. 694, 70 So. 1012. The courts of New York, it seems, were first to enunciate this rule. *Valton v. Nat'l, etc., Society* (N. Y. 1854) 22 Barb. 9, 38. Professor Vance says: "Consequently it is uniformly held that the mere fact of a man's insuring his own life for the benefit either of himself or of another is sufficient evidence of good faith to validate the contract." Vance, Insurance 128. The statement is too broad, for, as will be seen, it is far from "uniformly" so held where the beneficiary pays the premiums. Moreover, even when the *cestui* pays the premiums, in Texas the beneficiary is not beneficially entitled to the proceeds of the policy. *Goldbaum v. Blum* (1891) 79 Tex. 638, 15 S. W. 564, *per Gaines, J.*; *Wilton v. N. Y. Life Ins. Co.* (1903) 34 Tex. Civ. App. 156, 78 S. W. 403.

The courts have had the greatest difficulty in cases where the beneficiary pays the premiums. The typical case of this class is one in which A procures a policy upon his life, payable to his administrator, executor or assigns, for the purpose of assigning it immediately to B, who has no insurable interest in his life, and does assign it immediately to B, who pays the premiums. These cases have been erroneously classed with assignments made long after the policy is issued⁷² and much confusion has resulted therefrom. As pointed out above, in substance the procurement of the policy and its assignment constitute but one transaction, a designation by A of a beneficiary, B, who has no interest, and who pays premiums. It may be assumed either (1) that the entire proceeds of the policy are to belong to B, or (2) that someone else, C, is to receive all or a part of the proceeds.

Upon the first assumption, the transaction cannot be properly called a gift, since it is now the beneficiary and not the *cestui* who is making the investment. True, the practical effect of the arrangement is that the *cestui* gives the beneficiary the privilege of investing money upon the *cestui's* life; but this privilege is not a property right and "freedom of alienation" does not apply.⁷³ Moreover, assuming that the *cestui* is a normal risk, the privilege has little if any value,⁷⁴ since on the average the premiums (plus interest at a conservative rate) will exceed the proceeds of the policy. However, it would be going entirely too far to say that a recognition of this "law of averages", as it is sometimes called, would remove the evils of wagering; for by the same line of reasoning all gambling resorts would be deserted. Thus, the proprietor of a gambling house regulates the "game" so that his gains will exceed his losses, and his patrons generally recognize this. Yet each patron hopes that he will be the lucky one who will "come out ahead of the game," and this hope tempts him to take the risk of loss. The same is true of a lottery. Similarly, from the standpoint of each individual beneficiary, a life insurance contract of the sort here discussed is "speculative".⁷⁵ Is it therefore to be condemned? There are numerous statements in the reports to the effect that all "speculative" contracts are void.⁷⁶ Yet the statement is too

⁷²Warnock v. Davis (1881) 104 U. S. 775; and see note, 3 L. R. A. (N. S.) 935.

⁷³Schwerdt v. Schwerdt (1908) 235 Ill. 386, 85 N. E. 613.

⁷⁴Burbage v. Windley, *supra*, footnote 21.

⁷⁵The Century Dictionary defines "speculation" as "the investment of money at a risk of loss on the chance of unusual gain."

⁷⁶See, for example, the quotation from Reed v. Ass'n, *supra*, footnote 64.

broad.⁷⁷ In a sense, every contract involves the taking of a risk⁷⁸ and the chance of unusual gain inheres in many contracts which are regarded as valid and enforceable.⁷⁹ This is true, for example, of dealings in "futures", in mining and oil stock, and annuities.⁸⁰ In all of these cases it is conceived that the transaction fulfills some useful economic purpose, and the chance of unusual gain is a powerful stimulus to individual industry and enterprise.⁸¹ Where this is not true, the speculation leads to a non-productive gain, and if thereby an opportunity is offered to persons generally to live without useful industry, the speculation is to be condemned.⁸² If the law required that every contract should have, manifestly, a useful object, it is doubtful if the insurance contract of the sort here discussed could justify itself. However, the law enforces all agreements except those which are clearly harmful; and the harmful tendencies of such an agreement are reduced to a negligible minimum by the requirement that the *cestui*, and not the beneficiary, shall take the initiative in procuring the policy. It may be noted, too, that the beneficiary's gain is less in this case than where the *cestui* pays the premiums. It is submitted, therefore, that the mere fact that the beneficiary pays the premiums should not make the transaction void.⁸³

If all of the proceeds of the policy are to go to some third person, neither the *cestui* nor the person who pays the premiums, the transaction is a gift by the person paying the premiums, and is unobjectionable.⁸⁴ Where by the terms of the policy or by a separate agreement, the person who pays the premium is to receive a substantial part of the proceeds, the balance going to some third person who pays nothing, the transaction may be a gift by the beneficiary paying the premiums⁸⁵ or possibly a pledge to secure the repayment of the premiums. The situation is practi-

⁷⁷Professor Ely *op. cit.* 389 regards speculation as either good or bad.

⁷⁸Holmes, *The Common Law*, pp. 299, 300.

⁷⁹*Mut. L. I. Co. v. Allen*, *supra*, footnote 33, at p. 30.

⁸⁰*Cronin v. Vermont Life Ins. Co.* (1898), 20 R. I. 570, 40 Atl. 497.

⁸¹Professor Ely notes a tendency to cut down speculative gains. 1 Ely *op. cit.* 388-411.

⁸²Compare the holdings as to buying and selling "futures", *supra*, p. 387 and note 21a.

⁸³Richards, *Insurance* 51.

⁸⁴*Burke v. Prudential Ins. Co.* (1893) 155 Pa. 295, 26 Atl. 445. The *cestui* procured a policy on her life and delivered it to her daughter-in-law with instructions to pay the premiums, and to deliver the proceeds, after paying the *cestui's* funeral expenses, to her child, the *cestui's* grandchild.

⁸⁵As in *Reed v. Provident, etc., Society*, *supra*, footnote 64.

cally the same as if two policies were issued, *e. g.*, one payable to Y, who pays nothing, the other payable to B, who agrees to pay the premiums on both. Since the latter is open to the same objections as the policies discussed in the last paragraph, this case does not rest upon a very different basis from that one. Yet one circumstance should be noted: the fact that B is to divide the proceeds with the *cestui's* widow or other dependent furnishes a possible motive for the *cestui* to procure the policy upon his own initiative; and yet it gives B a greater incentive to desire the *cestui's* premature death than is the case where B is to receive the entire proceeds.

It is believed that the weight of authority supports the view that the mere payment of premiums by the beneficiary who has no interest, upon a policy procured by the *cestui*, does not *ipso facto* render the policy void.⁸⁶ In a number of cases where A procured a policy upon his life and at once made it payable in whole or in part to B, who had no interest in A's life and who agreed to pay all the premiums, the courts have held the transaction to be a pure wager and have denied B the right to the proceeds of the policy.⁸⁷ In most of the cases cited in the last note it is not clear whether the payment of premiums by the beneficiary was regarded *per se*

⁸⁶Richards, *op. cit.*, 51; Fidelity Mutual Life Ass'n. v. Jeffords (C. C. A. 1901) 107 Fed. 402, 410 (beneficiary was *cestui's* brother and agreed to pay 3/13 of proceeds to *cestui's* wife); New York Life Ins. Co. v. Greenlee (1908) 42 Ind. App. 82, 84 N. E. 1101 (beneficiary, son of *cestui*, to receive all the proceeds of endowment policy); Ancient Order, *etc.* v. Brown (1901) 112 Ga. 545, 37 S. E. 890 (renewal of fraternal certificate in favor of *cestui's* creditor, who paid premium; court treats it as a new policy); Burdette v. Columbus, *etc.*, Ins. Co. (W. Va. 1917) 93 S. E. 366 (on life of foster daughter); Harrison's Adm'r. v. Northwestern, *etc.*, Ins. Co. (1906) 78 Vt. 473, 63 Atl. 321 (beneficiary paid only the last premium, *cestui* paying the others); Burke v. Prudential Ins. Co., *supra*, footnote 84; Potvin v. Prudential Ins. Co. (1916) 225 Mass. 247, 114 N. E. 292 (possibly a pledge); Reed v. Provident *etc.*, Society, *supra*, footnote 64; Langdon v. Union, *etc.*, Ins. Co. (D. C. 1882) 14 Fed. 272 (*cestui* a brother-in-law of beneficiary); American Nat'l. Ins. Co. v. Moore, *supra*, footnote 71 (beneficiary, aunt of *cestui*, paid part of premiums); Langford v. Nat'l., *etc.*, Ins. Co., *supra*, footnote 71 (beneficiary paid part of premium).

⁸⁷Riner v. Riner (1895) 166 Pa. 617, 31 Atl. 347; Lanouette v. Laplante (1892) 67 N. H. 118, 36 Atl. 981; West v. Sanders (1898) 104 Ga. 727, 31 S. E. 619 (Seemingly overruled by Ancient Order, *etc.* v. Brown, *supra*, footnote 86); McRae v. Warmack (1911) 98 Ark. 52, 135 S. W. 807; Bendet v. Ellis (1908) 120 Tenn. 277, 111 S. W. 795; Ruth v. Katterman (1886) 112 Pa. 251, 3 Atl. 833; Hoffman v. Hoke (1888) 122 Pa. 377, 15 Atl. 437; Bromley's Adm'r. v. Wash. Life Ins. Co. (1906) 122 Ky. 402, 92 S. W. 17; Burbage v. Windley, *supra*, footnote 21; Met. Life Ins. Co. v. Elison (1905) 72 Kan. 199, 83 Pac. 410; Mut. Benefit Ass'n. v. Hoyt (1881) 46 Mich. 473, 9 N. W. 497; Cisna v. Sheibley (1899) 88 Ill. App. 385; Hinton v. Mutual, *etc.*, Ass'n. (1904) 135 N. C. 314, 47 S. E. 474; Warnock v. Davis, *supra*, footnote 72; Trinity College v. Traveler's Ins. Co. (1893) 113 N. C. 244, 72 S. E. 175 (suit for surrender value).

as making the contract void, or whether it was regarded as strong evidence that the beneficiary was the active and moving party in the transaction. The distinction is substantial. The real issue is whether or not the beneficiary took the initiative in procuring the policy. The fact that the policy was procured by the *cestui* under an agreement whereby the intended beneficiary was to pay the premiums, is an evidential fact upon that issue. It is not conclusive, but taken with the surrounding circumstances it may produce an irresistible inference that the *cestui* was but a tool in the hands of the beneficiary.

Upon this basis, the leading case of *Warnock v. Davis* may be explained. The policy for \$5,000 was procured by one Crosser upon his own life, payable to his assigns. On the next day the policy was, by a written assignment executed by Crosser, made payable, as to nine-tenths of the proceeds to the Scioto Trust Association (a partnership composed of Davis and others), which had no interest in Crosser's life, and as to one-tenth to Crosser's widow. The policy was procured by Crosser, it would seem, and was certainly assigned by him, as a result of an agreement whereby the Trust Association agreed to pay all the premiums on the policy, and Crosser agreed to pay to the association \$6 at once and \$2.50 annually during his life. The Supreme Court held that the association could retain out of the proceeds of the policy only enough to reimburse itself for premiums paid. Crosser was a tanner, and presumably a man of small means. While the facts do not disclose the origin of the arrangement, it is a reasonable inference that the association induced Crosser to procure the policy. If so, the court was right in calling it a "wager"—though, like little Buttercup, the court "could never tell why." Mr. Justice Field takes occasion to discuss the nature of the beneficiary's interest, the necessity of a continuing interest, and assignments generally, and it is doubtful if any *obiter dicta* have led to more widespread and harmful results. One is not disposed to quarrel with the decision, however, for it rests upon the simple proposition that a man cannot procure insurance upon a life in which he has no insurable interest. A majority, if not all, of the cases cited in the last note may be explained upon this basis.⁸⁸

⁸⁸In the following cases it may confidently be asserted that the facts show that the beneficiary was "the active and moving party in the transaction": *Burlage v. Windley*, *supra*, footnote 21; *McRae v. Warmack*, *supra*, footnote 87 (in *Langford v. Insurance Co.*, *supra*, footnote 71, a later case, *McRae v. Warmack* is distinguished on this ground); *Bendet v. Ellis*, *supra*, footnote 87; *Hoffman v. Hoke*, *supra*, footnote 87; *Mutual Benefit*

It must be borne in mind that the aim is primarily to discourage wagering as a vocation, and that hence the court will always condemn a life insurance contract where the beneficiary is engaged in the *business* of paying premiums upon policies upon lives in which the beneficiary has no "interest", as in *Warnock v. Davis* and in *Cisna v. Sheibley*.⁸⁹ If there is any evidence that the beneficiary had peculiar knowledge that the *cestui* was a sub-normal risk, this, too, strongly supports an inference that the beneficiary in effect procured the policy.⁹⁰ A rigid physical examination by the insurer, however, will eliminate such practices.⁹¹

Surveying the decisions for the past century, one perceives a marked trend toward reducing the requirements of insurable interest (and the requirement of circumstances which dispense with it) to a minimum.^{91a} Has the minimum been reached? One possibility in the way of further reducing the requirements is to recognize the consent of the *cestui* as alone sufficient to dispense with the necessity of insurable interest in the beneficiary. Upon principle, is this reduction desirable? The consent of the *cestui* would reduce the murder-tendency to a probability at least as slight as in the case of devises and the other transactions mentioned above. However, one needs only to examine cases like *Cisna v. Sheibley*, *Warnock v. Davis* and others cited in the notes⁹² to discover that men are not sufficiently revolted by the thought of wagering upon their own lives, to prevent them from engaging in such a transaction. Consent of the life insured will not, then, eliminate wagering; and while the requirement of consent of the *cestui* would undoubtedly greatly reduce the promiscuity of such wagering, the ease with which such consent may be procured from many

Ass'n. v. Hoyt, *supra*, footnote 87; *Bromley's Adm'r. v. Wash. Life Ins. Co.*, *supra*, footnote 87; *Hinton v. Ass'n.*, *supra*, footnote 87; *Langdon v. Mutual Life Ins. Co.*, *supra*, footnote 86 (but here the beneficiary was allowed to recover). In *Lanouette v. Laplante*, *supra*, footnote 87, the *cestui* was a parishoner of the beneficiary, a priest, but it seems that the procurement of the policy was upon the *cestui's* initiative. In the other cases cited in the last note there seems to be nothing to support the idea that the beneficiary took the initiative, other than the fact that he agreed to pay the premiums.

⁸⁹See footnote 90, *infra*.

⁹⁰*Cisna v. Sheibley*, *supra*, footnote 87. Here a physician and an insurance agent formed a partnership to procure policies upon the lives of persons selected by the physician from among his patients. It was proved that a large number of the *cestuis* died soon after the policies were issued.

⁹¹See also *Volunteer State Life Ins. Co. v. Buchanan* (1912) 10 Ga. App. 255, 73 S. E. 602.

^{91a}*Burdette v. Ins. Co.*, *supra*, footnote 86. See 125 L. T. 548.

⁹²*Supra*, footnotes 88 and 89.

individuals, invites the conclusion that life-wagering would not by this check alone be reduced to a negligible minimum. The cases last referred to sustain the view that neither the consent of the *cestui* nor the consent of the insurer is a sufficient guaranty against wagering.

Yet in one case, *Langdon v. Union Mutual Life Insurance Co.*⁹³ the consent of the *cestui* seems to have been the only prophylactic element, and the beneficiary was allowed to recover. One Baker, the plaintiff's brother-in-law, a man of no means, but not indebted to plaintiff or in any way dependent on him, procured a policy upon his (Baker's) life, payable to plaintiff if he survived Baker (if not, to Baker's representative), and plaintiff, pursuant to their arrangement, paid all the premiums. It appeared that plaintiff paid the premiums on other policies, aggregating \$6,000, upon Baker's life, all payable to plaintiff. The court declined to rule as a matter of law that the policy was invalid for want of insurable interest in plaintiff, and submitted to the jury the question whether the policy was taken out in *good faith* by Baker with a designation of plaintiff as beneficiary, or whether it was intended by plaintiff as a wagering transaction on Baker's life. The verdict was for the plaintiff. It is submitted that the facts show clearly that plaintiff took the initiative in having the policy issued for his own benefit and that the action of the court in allowing the case to go to the jury amounted practically to a ruling that Baker's consent might be sufficient.

It may be, however, that beneath the ample folds of the phrase "good faith" is concealed the notion that Baker must have been something more than a merely nominal party to the transaction. It is submitted that the court should have omitted the dubious terms "good faith" and "wagering transaction" and charged the jury along the lines suggested in *Johnson v. Van Epps*. The phrase "good faith" has gained considerable currency as a touchstone for identifying wagering contracts of insurance.⁹⁴ Thus, in *Vance, Insurance*,⁹⁵ "good faith" is declared to be "the logical test" of the validity of a life insurance contract. Does "good faith" mean that the parties must be free from any consciousness of wrong-doing in procuring the policy? In *Warnock v. Davis, supra*, and *McRea v. Warmack, supra*, the court distinctly said that the transaction did not involve any "moral turpitude". Does "good faith" mean that

⁹³*Supra*, footnote 86.

⁹⁴*E. g., Connecticut etc., Ins. Co. v. Schaefer* (1877) 94 U. S. 457.

⁹⁵At p. 103.

the purpose is not to evade the law against wagering? If so, what is the law, and as a corollary, when is it evaded? The "good faith test" answers neither of these questions. Or, to put it another way, is the absence of intent to make a "wager", "good faith"? Then what is a "wager", and how are the parties to know when they are making one, unless each man is the sole judge of his own "good faith"? It is submitted that the law's standard of harmfulness is objective, not subjective, and that "good faith" is not only futilely ambiguous, but also positively misleading.⁹⁶ As noted by Mr. Justice Holmes in another connection,⁹⁷ it is not unusual for courts to evade difficult questions of law by leaving them to the jury.⁹⁸ The phrase "good faith" is valueless as a universal test of insurable interest.⁹⁹

Yet the existence of deception, duress, mistake or even of undue advantage or ignorance, or of any other subjective defect in the *cestui's* consent, will strengthen the inference that the beneficiary was the active party in the transaction. Thus, in *Hinton v. Mutual Reserve Fund Life Association*,¹⁰⁰ a Mrs. Brothers made application for and procured a policy on her life payable to plaintiff, who had no interest in her life, and paid the premiums. Mrs. Brothers was an illiterate woman who was unable to sign her name, and plaintiff had a mortgage on her husband's land for as much as it

⁹⁶Professor Vance anticipates criticism of the vagueness of the phrase "good faith" and endeavors to disarm it by calling attention to the necessity of determining the existence of good faith in other legal transactions—for instance, in applying the rules as to priority of liens and as to the rights of holders of negotiable paper. Vance, *Insurance* 103, n. 18. Again, he remarks: "It is certainly no more difficult to determine whether a contract of insurance has been made in good faith than whether land has been so purchased." (*ibid.*) In the illustrations given, "good faith" means diligence in ascertaining or in securing one's rights, or the absence of fraud or deception—things wholly irrelevant to the determination of insurable interest, which concerns not individual rights but the public interest.

⁹⁷The History of Agency, 3 Select Essays in Anglo-American Legal History 405, n. 1.

⁹⁸Another example is *Brockway v. Mutual, etc., Ins. Co.* (D. C. 1881) 9 Fed. 249. Plaintiff induced Brockway, an impecunious shoemaker, to take out insurance in the sum of \$40,000 on his life in favor of plaintiff, who paid the premiums. Plaintiff claimed the policy was to secure Brockway's note to plaintiff, but the evidence created a suspicion that the note was gratuitous. Here again the court left it to the jury to say whether or not the policy was taken out in "good faith" or as a mere speculative transaction. Here "good faith" involves two questions: (1) Was the note a mere sham to give plaintiff a pretended insurable interest and (2) if not genuine, was the plaintiff the active and moving party to the transaction?

⁹⁹Richards, *Insurance* (3rd ed.) 41, n. 1; *Crismond's Adm'x v. Jones* (1915) 117 Va. 34, 83 S. E. 1045.

¹⁰⁰*Supra*, footnote 87.

was worth. The court (properly, it seems) held that plaintiff could not recover on the policy.

If the *cestui's* consent is not a *sufficient*, is it a *necessary* condition to the validity of the policy? If the analysis made above is correct, the consent of the *cestui* is only *one* of the circumstances which will reduce the harmful tendencies of life insurance to a negligible minimum; and where the beneficiary has an insurable interest, the consent of the *cestui* is immaterial. Aside from the analytical argument, the matter is of some practical importance. For instance, if the consent of the *cestui* is necessary, an infant's life could not be insured.¹⁰¹ Moreover, a woman could not then insure her husband's life in her favor without his consent.¹⁰² The authorities are divided.¹⁰³ The question will rarely arise, however, owing to the prevailing practice of insurance companies of requiring the *cestui que vie* to sign an application.¹⁰⁴ Where the beneficiary has no interest and the policy is issued without the consent of the *cestui*, the policy is clearly void.¹⁰⁵

(b.) *The Beneficiary's Interest.*

Life insurance policies, procured by the beneficiaries therein upon the lives of other persons, may be regarded as sufficiently

¹⁰¹In *Grattan v. Nat'l. Life Ins. Co.* (N. Y. 1878) 15 Hun 74, a father who insured the life of his minor son was allowed a recovery.

¹⁰²Kentucky has carried the requirement as to consent to this extreme. In *Met. Life Ins. Co. v. Smith* (1900) 22 Ky. L. R. 868, 59 S. W. 24, the court held that a policy procured by the wife without the husband's consent was void.

¹⁰³*Consent necessary.* Chicago, *etc.*, *Society v. Dyon* (1898) 79 Ill. App. 100, (adult son on life of father); *Life Ins. Co. v. Smith*, *supra*, footnote 102; *Met. Life Ins. Co. v. Blesch* (1900) 22 Ky. L. R. 530, 58 S. W. 436 (daughter on life of father); *Met. Life Ins. Co. v. Monohan* (1897) 102 Ky. 13, 42 S. W. 924; *Met. Life Ins. Co. v. Trende* (1899) 21 Ky. L. R. 909, 53 S. W. 412; *Met. Life Ins. Co. v. Sehlhorst* (1899) 21 Ky. L. R. 912, 53 S. W. 524; Vance, *Insurance* 145, 248.

Consent unnecessary. *Met. Life Ins. Co. v. Bowser* (1898) 20 Ind. App. 557, 50 N. E. 86; *Shaddinger v. Met. Life Ins. Co.* 30 Ohio L. J. 337 (*seem*); *Guardian, etc., Ins. Co. v. Hogan* (1875) 80 Ill. 35 (*seem*—son in father's life); *McCann v. Met. Life Ins. Co.* (1900) 177 Mass. 280, 58 N. E. 1026 (*seem*); *Delouche v. Met. Life Ins. Co.* (1899) 69 N. H. 587, 45 Atl. 414; *Richards, op. cit.* 41 n. 4. In *Grattan v. Nat'l. Life Ins. Co.*, *supra*, footnote 101, the minor son signed the application, but if consent means anything more than a mere form, the consent of a minor is not a juristic consent. See also 56 L. R. A. 585, note.

¹⁰⁴*Richards, op. cit.* 50, n. 5.

¹⁰⁵Thus in *Rombach v. Piedmont, etc., Ins. Co.* (1883) 35 La. Ann. 233, the plaintiff, learning that his mother-in-law had applied for insurance on her life, without her knowledge or consent applied for a policy on her life payable to himself. The policy was issued upon the showing made in her application. She later protested when she learned of the transaction. The court denied the plaintiff a recovery.

immunized against harmful social tendencies, upon two distinct grounds:—First, the “indemnity” theory. If it be reasonably probable that the beneficiary’s loss, occasioned by the *cestui’s* death, will at least equal the amount of the policy, no unearned gain will result to the beneficiary from the policy (thus eliminating the wagering evil) and the murder-tendency then becomes negligible. Secondly, even if it be recognized that an unearned gain may result to the beneficiary by reason of the *cestui’s* premature death, the class of persons who may become beneficiaries may be so restricted that the evils of wagering on lives will be reduced to a negligible minimum. This may be called the “restricted class” theory. It is necessarily somewhat vague; yet the fact that the indemnity theory will not explain many well recognized “interests” proves that some such principle is more or less tacitly assumed by the courts. In determining the limitations of the class, the tendency will be, of course, to approach the indemnity theory, for therein lies unquestionable safety. In analyzing the decisions, it must be borne in mind that in a majority of cases the policy has been issued upon the *cestui’s* initiative, and hence the discussion of insurable interest is immaterial;¹⁰⁶ yet these cases will be cited as holdings upon the question of the beneficiary’s interest. For purposes of discussion, the decisions may be grouped under four heads:—

1. Where the *cestui’s* death renders impossible the performance of his legal obligation to the beneficiary, life insurance assumes the aspect of an indemnity contract. Thus, the husband’s legal obligation to support his wife gives her an insurable interest in his life;¹⁰⁷ and the wife’s obligation to render services to him gives him an insurable interest in her life.¹⁰⁸ A contract to marry gives the woman an interest in her fiancé’s life,¹⁰⁹ and by parity of reasoning, a man should have an “interest” in his fiancée’s life. A father’s legal right to the services of his minor son gives him an insurable interest in the son’s life,¹¹⁰ and a contract of employment gives the employer an interest in the life of the employee,¹¹¹ and

¹⁰⁶For instance, *Powell v. Mutual, etc., Ins. Co.* (1898) 123 N. C. 103, 31 S. E. 381.

¹⁰⁷The cases are numerous. See 53 L. R. A. 817, note; Vance, Insurance 101; cases cited in footnote 151, *infra*.

¹⁰⁸*Currier v. Ins. Co.* (1885) 57 Vt. 496.

¹⁰⁹*Chisholm v. Nat’l. Ins. Co.* (1873) 52 Mo. 213; *Taylor v. Traveler’s Ins. Co.* (1897) 15 Tex. Civ. App. 254, 39 S. W. 185.

¹¹⁰*Mitchell v. Union Life Ins. Co.* (1858) 45 Me. 104.

¹¹¹*Mut. Life Ins. Co. v. Board* (1914) 115 Va. 836, 80 S. E. 565, in which it was held that a corporation had an insurable interest in the life of its manager.

the employee an interest in the life of his employer.¹¹² In these cases the legal obligation, being of a personal nature, is extinguished by the death of the *cestui*, and the beneficiary suffers a total loss of the obligation. Yet even here, where the indemnity purpose seems fairly clear, the principle of subrogation is not applied, since the insurer is not subrogated to the rights of the beneficiary against one who has wrongfully caused the death of the *cestui*,^{112a} nor, except for the English case of *Hebdon v. West*,^{112b} has any court ever assumed to limit the amount of recovery to actual loss.

In another class of cases, the *cestui's* obligation is to pay money, and is therefore not extinguished by his death; yet performance of the obligation may be rendered so uncertain by the obligor's death, that the obligee is given an insurable interest. Thus, a creditor has an insurable interest in his debtor's life,¹¹³ a creditor of a partnership in the life of one partner,¹¹⁴ and one partner in the life of another partner.¹¹⁵ In none of these cases is an effort made to apply the strict indemnity rule, *i. e.*, to limit the beneficiary's recovery to the actual loss occasioned him by the *cestui's* death. It is immaterial that the debtor is amply solvent and therefore his estate will be sufficient to pay the claim,¹¹⁶ or that the debt will be paid by other joint obligors,¹¹⁷ or that the debtor is so hopelessly insolvent that there is no reasonable prospect of his ever being able to pay.¹¹⁸ So, too, it seems that the court will not inquire as to the value of the minor's services to his father, or of the wife to the husband.¹¹⁹ And it seems that those courts which

¹¹²*Hebdon v. West*, *supra*, footnote 51.

^{112a}*Connecticut, etc., Ins. Co. v. New York, etc., R. R.* (1856) 25 Conn. 265; *Insurance Co. v. Brame* (1877) 95 U. S. 754. Even if the insurer in a life policy re-insures, he is not limited to strict indemnity, for he may recover upon the re-insurance policy even though his "interest" has ceased to exist when the *cestui* dies. *Dalby v. Assurance Co.*, *supra*, footnote 40.

^{112b}*Supra*, footnote 51.

¹¹³The cases are numerous. See Vance, Insurance 137.

¹¹⁴*Morrell v. Trenton, etc., Ins. Co.* (1852) 64 Mass. 282.

¹¹⁵*Bevin v. Connecticut, etc., Ins. Co.*, *supra*, footnote 54; *Miller v. Eagle, etc., Ins. Co.* (N. Y. 1854) 2 E. D. Smith 268; *Connecticut, etc., Ins. Co. v. Luchs* (1883) 108 U. S. 498, 2 Sup. Ct. 949; *Rahders v. People's Bank* (1911) 113 Minn. 496, 130 N. W. 16. *Semble contra*: *Powell v. Mutual, etc., Ins. Co.*, *supra*, footnote 106.

¹¹⁶*Morrell v. Trenton, etc., Ins. Co.*, *supra*, footnote 114.

¹¹⁷*Supra*, footnote 114.

¹¹⁸*Morrow v. Nat'l. Life Ass'n.* (1914) 184 Mo. App. 308, 168 S. W. 881, 885. See the opinion of Jones, J., in *Crosswell v. Connecticut Indemnity Ass'n*, *supra*, footnote 2; Bliss, Life Insurance § 13; note in 57 Am. Dec. 97.

¹¹⁹Richards, Insurance (3rd ed.) 42; Vance, Insurance 101. In *Currier v. Ins. Co.*, (see note 108) the court suggested that if the wife were insane

have allowed creditors to recover the full amounts of policies for two or three times the amount of the debt, have palpably disregarded the strict indemnity theory.^{119a} In explanation of some of the cases cited in the last five notes, it has been suggested that a life insurance policy is a "valued policy", the amount of loss to be sustained by the beneficiary being liquidated in advance by agreement.¹²⁰ The better view, however, would seem to be that a theory of strict indemnity, with the valued policy as a mere variation to avoid procedural difficulties (as in marine policies on profits, for example), is unnecessary to sustain life policies. Though it be assumed that the purpose of the beneficiary in procuring the policy is indemnity, the law enforces the contract, not the purpose. The law is seeking merely to restrict the eligible beneficiaries to a "roughly selected class of persons who, by their general relations to the insured" (*cestui que vie*), will render the harmful tendencies of such contracts negligible.

2. The early case of *Lord v. Dall*,¹²¹ paved the way for those numerous cases in which it has been held that a reasonable expectation of pecuniary advantage to the beneficiary from the continued existence of the *cestui*, gives a sufficient "interest". It would, indeed, be absurdly technical to recognize the interest of a secured creditor in an amply solvent debtor, and to deny that a sister (as in *Lord v. Dall*) or other dependent relative, might insure the life of the person actually supporting her. Hence, a foster child has an insurable interest in the life of its foster parent who will presumably continue to support it,¹²² and a woman who is living with a man under the honest but mistaken belief that she is his wife, and is being supported by him, has an insurable interest in the life of

or otherwise a burden and not a benefit, the husband could not insure her life; but as Professor Vance points out, the same reasoning would preclude insurance by the father upon his minor son's life, since the latter's services seldom equal the burden of his support.

^{119a}The amount of the policy is given in parenthesis, followed by the amount of the debt: *Wright v. M. B. L. Ass'n.* (1890) 118 N. Y. 237, 23 N. E. 186 (\$5,000—\$2,823); *Amick v. Butler* (1887) 111 Ind. 578, 12 N. E. 518 (\$2,000—\$600); *Rittler v. Smith* (1889) 70 Md. 261, 16 Atl. 890 (\$6,500—\$1,000); *Grant's Adms. v. Kline* (1887) 115 Pa. 618, 9 Atl. 150 (\$3,000—\$743); *Appeal of Corson* (1886) 113 Pa. 438, 6 Atl. 213 (\$3,000—\$750). For a discussion of cases where the debt is evasively small, see *infra*, p. 417.

¹²⁰*Bevin v. Ins. Co.*, *supra*, footnote 115; *Richards, op. cit.*, 31, 45.

¹²¹*Supra*, footnote 53.

¹²²*Carpenter v. U. S. Life Ins. Co.* (1894) 161 Pa. St. 9, 28 Atl. 943; *Berdan v. Milwaukee Mut. L. I. Co.* (1904) 136 Mich. 396, 99 N. W. 411.

her pseudo-spouse.¹²³ Likewise, an illegitimate child has been thought to have an insurable interest in the life of her putative father, who has recognized her and has contributed to her support.¹²⁴

In most of these cases the courts said that the *cestui* owed the beneficiary a "moral" obligation to support the latter. While the language in some instances might lead one to infer that a "moral obligation" alone is sufficient, it seems clear that such "moral obligation" alone is not a sufficient interest, where it is not coupled with facts showing a reasonable expectation that the obligation can and will be fulfilled.¹²⁵ In short, the "moral obligation" is an evidential fact tending to prove reasonable expectation of pecuniary advantage. Relationship between the beneficiary and the *cestui* is still more remotely an evidential fact, tending to support the beneficiary's expectations.¹²⁶ Close relatives are traditionally under a "moral obligation" to aid each other in times of distress; but no insurable interest arises therefrom unless there is shown an ability and a willingness to fulfill the obligation. Still, the degree of relationship will swing the decision in doubtful cases. Thus, in the same jurisdiction it has been held that occasional gifts by the *cestui* to the beneficiary, his niece, who lived in the same house with him, were not sufficient to establish her pecuniary interest in his life,¹²⁷ while the occasional benefactions of a putative father to his illegitimate daughter were regarded as sufficient evidence of a pecuniary interest.¹²⁸ Various business relationships will also establish an insurable interest falling under this head, *e. g.*, the interest of a corporation in the life of its chief stockholder, whose name and influence constitute a valuable asset,¹²⁹

¹²³*Supreme Lodge v. Hutchinson* (1892) 6 Ind. App. 399, 33 N. E. 816; *Scott's Admr. v. Scott* (1904) 25 Ky. L. Rep. 1356, 77 S. W. 1122. For other cases, see note, 47 L. R. A. (N. S.) 252. Cases in which a valid common law marriage exists do not, of course, fall in this class.

¹²⁴*Maxey v. Franklin L. I. Co.* (Tex. Civ. App. 1914) 164 S. W. 438; *Overton v. Colored Knights of Pythias* (Tex. Civ. App. 1915) 173 S. W. 472.

¹²⁵*Guardian Mut. etc., Ins. Co. v. Hogan*, *supra*, footnote 103 (adult son in life of aged father); *O'Neill v. Life Ins. Clearing Co.*, *supra*, footnote 2 (same).

¹²⁶Since relationship is merely an evidential fact, a complaint in an action upon a life insurance policy which avers merely that the plaintiff and the deceased were closely related, as that the *cestui* was plaintiff's daughter, is demurrable for failure to allege an insurable interest. *Continental, etc., Ins. Co. v. Volger* (1883) 89 Ind. 572.

¹²⁷*Wilton v. New York Life Ins. Co.* (1903) 34 Tex. Civ. App. 156, 78 S. W. 403.

¹²⁸*Maxey v. Franklin Life Ins. Co.*, *supra*, footnote 124.

¹²⁹*Keckley v. Coshoccon Glass Co.* (1912) 86 Oh. St. 213, 99 N. E. 299.

or of its manager, whose skill and judgment are of incalculable importance to its success.¹³⁰ All of the cases falling under this head resemble the first class of cases in that the interest is always pecuniary; but differ in that here an actual probability of loss is always the ultimate issue of fact, whereas in the case of legal obligations, probability of loss is often a fiction.

3. Comparatively few cases recognize the fact that the beneficiary has been or will be called upon to make gratuitous expenditures for the *cestui* as giving an insurable interest. Strangely, the English courts have recognized this sort of an "interest".¹³¹ In *Cronin v. Vermont Life Ins. Co.*,¹³² an aunt who had supported her niece since early childhood was held to have an insurable interest in the life of the niece, the court saying that the "moral obligation" owed by the niece to the aunt was a sufficient "debt" to support a policy.¹³³ However, as indicated above, the overwhelming weight of authority is opposed to the view that a "moral obligation", without evidence that it can and will be fulfilled, is a sufficient insurable interest.¹³⁴ The majority view seems preferable. Such an interest is fictitious, and the class of fictitious pecuniary interests should not be extended beyond those mentioned in discussing class 1. Moreover, in cases where the beneficiary feels some social constraint to continue the support of an aged or infirm relative, the procurement of such a policy gives the former a direct interest in the latter's premature death.

4. The interests discussed have all been "pecuniary". With the third class eliminated, the moving factor is seen to be similar to that which governs indemnity insurance: a real or fictitious pecuniary loss to the beneficiary. The assertion that no other than a pecuniary interest will be recognized in life insurance has been

¹³⁰*Mutual Life Ins. Co. v. Board*, *supra*, footnote 111.

¹³¹*Barnes v. London, etc., Ins. Co.* [1892] 1 Q. B. 864; where it was held that a woman had a sufficient interest in the life of her minor step-sister whom she had undertaken to rear and support. But see *Harse v. Pearl Life Ass. Co.* [1903] 2 K. B. 92.

¹³²*Supra*, footnote 80.

¹³³*Accord: Thomas v. Nat'l. Benefit Ass'n.* (1913) 84 N. J. L. 281, 86 Atl. 375; *cf. Matlock v. Bledsoe* (1905) 77 Ark. 60, 90 S. W. 848.

¹³⁴*Guardian, etc., Ins. Co. v. Hogan*, *supra*, footnote 103; *O'Neill v. Life Ins. Clearing Co.*, *supra*, footnote 2. In this case the court held that an adult son had not an insurable interest in the life of his aged father, but said that the son might have an insurable interest to the extent of the sums actually expended in supporting the father. If it be assumed that the expenditures are gratuitous (*i. e.* such as not to raise any legal obligation upon the father to repay them), the *dictum* is inconsistent with the reasoning of the case. See also *Prudential Ins. Co. v. Jenkins* (1896) 15 Ind. App. 297, 43 N. E. 1056.

frequently made and generally followed. Yet the opinion is not unanimous. "Love and affection" has more than once been recognized as enough. The statement of Chief Justice Shaw in *Loomis v. Eagle Life and Health Insurance Co.*¹³⁵ is the leading authority:—

"We cannot doubt that a parent has an interest in the life of a child, and *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law."

The statement of Jones, J., in *Crosswell v. Connecticut Indemnity Ass'n.*¹³⁶ is even stronger:—

"Close ties of blood or affinity, as parent, child, brother, sister, husband, wife, with the natural affection and moral forces which generally prompt one such to serve and protect the other, rendering it highly improbable that one for money would take the life of the other, afford a surer guaranty to society against the dangers of betting on the duration of human life, than any mere pecuniary interest in the life insured, often more imaginary than real."

This view has, apparently, a respectable following.¹³⁷ The following arguments may be adduced in support of the minority view: The doctrine that a pecuniary interest is necessary was ingrafted by the English statute.¹³⁸ The so-called "pecuniary" interest is in many cases "more imaginary than real."¹³⁹ This is merely an argument of consistency, and, as usual, cuts both ways. Again, a beneficiary who has actually (not merely presumably) a strong affection for the *cestui*, will probably not kill the *cestui*. This disposes of

¹³⁵ (1856) 72 Mass. 396, 399.

¹³⁶ (1897) 51 S. C. 103, 114, 28 S. E. 200.

¹³⁷ *Aetna Life Ins. Co. v. France* (1876) 94 U. S. 561; *Valley Mutual Life Ass'n. v. Teewalt* (1884) 79 Va. 421; *Crismond's Adm'x. v. Jones*, *supra*, footnote 99, (*semble*: son in father's life); *Woods v. Woods*, *Adm'r.*, *supra*, footnote 1; *Reserve Mut. Ins. Co. v. Kane* (1876) 81 Pa. 154, 156; *Farmer's, etc., Bank v. Johnson* (1902) 118 Iowa 282, 91 N. W. 1074; *Breese v. Met. Life Ins. Co.* (1899) 37 App. Div. 152, 55 N. Y. Supp. 775.

¹³⁸ See the remarks of Clay, C., in *Woods v. Woods*, *Adm'r.*, *supra*, footnote 1; also the criticism of the English statute by Shaw, C. J., in *Loomis v. Ins. Co.*, *supra*, footnote 135.

¹³⁹ This argument is elaborated in *Crosswell v. Ass'n.*, *supra*, footnote 136.

only one of the two difficulties inherent in the subject. As for the wagering feature, natural instincts would revolt against a mercenary desire to bet upon the premature death of a beloved one, and the "psychological efficiency" of the law would be guaranteed.¹⁴⁰ Moreover, the evils of wagering contracts are chiefly such as arise from the promiscuity with which they are entered into. The law does not attempt to say that a man shall not receive anything except that which he earns; it merely limits the opportunities for non-productive gain to a certain extent—the test, it seems, is whether or not an opportunity for livelihood without industry will be offered to persons generally. It is submitted that the "interest" of affection practically removes this opportunity, by making a "roughly selected class of persons" of whom only a negligibly small number would seek gain by insurance upon the lives of those for whom they feel a strong affection.

To the objection that affection is an evanescent fact, it may be answered that juries are often called upon to pass upon the existence of affections, as in breach of promise and alienation of affections suits. Close relationship would be strong but not conclusive evidence of affection; so, too, would gratuitous expenditures or the support of the *cestui* by the beneficiary. In the light of this analysis, the much-quoted statement of Field, J., in *War-nock v. Davis*¹⁴¹ is confusing:—

"It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."

¹⁴⁰"The essential characteristic of law is that it shall prevail; for this, it is necessary that its psychological efficiency be guaranteed. "The operation of a law is guaranteed when the motive power of its prescriptions is so re-enforced by social psychological influences, that the expectation is justified that the norms which the law enforces will be able to assert themselves as motives of conduct against the opposing individual motives." Berolzheimer, *The World's Legal Philosophies* (Jastrow's translation) p. 441, quoting Georg Jellinek

¹⁴¹*Supra*, footnote 72, at p. 779.

This Delphic *dictum* has been cited to prove that a pecuniary interest is necessary and that hence an adult son has no interest in his father's life,¹⁴² and to prove that "affection" alone is sufficient, and that hence an adult son has an interest in his aged mother's life.¹⁴³

II. DURATION OF INTEREST.

In fire insurance and in marine insurance, it is elementary that the insured can recover nothing if he does not have an insurable interest when the loss occurs. On the contrary, in life insurance it is generally but not uniformly held that if the beneficiary, having a sufficient interest at the time when the policy is procured, ceases to have any interest before the death of the *cestui*, the beneficiary may, nevertheless, recover upon the policy; in other words, an incipient interest is sufficient. In *Dalby v. India and London Life Assurance Co.*,¹⁴⁴ (overruling *Godsall v. Boldero*)¹⁴⁵ the following reasons are given for this rule:—First, the hardship upon the insured. The premiums are fixed, and are calculated upon the face of the policy at the time it is taken. If the cessation or diminution of the beneficiary's insurable interest prevents or reduces the recovery, the insured will have paid for something which he does not get.¹⁴⁶ While this is true, *non sequitur* that the only solution of the difficulty is to allow a recovery of the full amount of the incipient interest. As was pointed out above, each premium represents two payments, one to cover the current risk, and the other to maintain the policy reserve. As to the former, the insured has received full value, because the risk has been incurred,¹⁴⁷ and there is no more injustice in the insurer's retaining this part of the premium than there is in the case of fire insurance where the policy expires without a fire having occurred. As to the latter, the policy holder may be fully protected by giving him his share of the reserve in the form of a "cash surrender value"; that is, as soon as his interest is terminated, he can be given his "investment". Most policies today provide for such

¹⁴²*O'Neill v. Life Ins. Clearing Co.*, *supra*, footnote 2. See also note by A. C. Freeman in 57 Am. Dec. 96.

¹⁴³*Woods v. Woods' Adm'r.*, *supra*, footnote 1. The excerpt quoted is set forth almost *verbatim* as a statement of the law in 14 R. C. L. 919, and with slight alterations is embodied in the text of Kerr, Insurance 282-283.

¹⁴⁴*Supra*, footnote 40.

¹⁴⁵(1807) 9 East 72.

¹⁴⁶This argument is emphasized in Richards, *op. cit.* § 46.

¹⁴⁷Vance, Insurance 46.

"cash surrender value". The second argument is the uncertainty resulting from a contrary rule. The argument of certainty would do away entirely with the requirement of insurable interest.

The best reason for the rule is that an incipient interest is a sufficient safeguard against promiscuous wagering on lives. The rule is aimed at the making of such contracts; the purpose of the contract is to be looked at as of the time when it was entered into.¹⁴⁸ Thus, the dissolution of a partnership does not preclude recovery upon a policy upon the life of one partner in favor of the other.¹⁴⁹ "Term" insurance would seem better suited to an interest of this sort. Where "whole life" insurance is taken, an approximate justice may be done by compelling the holder of the policy to accept the cash surrender value when the firm is dissolved.¹⁵⁰ However, the contract should be enforced as made, unless some good reason exists for refusing; and, it is submitted, no such reason exists. Likewise, a divorce *a vinculo* does not preclude a recovery by the wife upon a policy upon the life of the husband, procured during coverture.¹⁵¹ Nor are a creditor's rights under a policy upon the life of his debtor affected by the fact that

¹⁴⁸*Marquet v. Aetna Life Ins. Co.* (1913) 128 Tenn. 213, 159 S. W. 733. The same test is applied to stock gambling transactions. See footnote 21a, *supra*.

¹⁴⁹*Rahders v. People's Bank*, *supra*, footnote 115; *contra*, *Cheeves v. Anders* (1894) 87 Tex. 287, 28 S. W. 274; *Ruth v. Flynn* (1914) 26 Colo. App. 171, 142 Pac. 194 (*semble*).

¹⁵⁰This was substantially the result reached in *Cheeves v. Anders*, *supra*, footnote 149.

¹⁵¹*Connecticut, etc., Ins. Co. v. Shaefer*, *supra*, footnote 94; *Filley v. Illinois Life Ins. Co.* (1914) 91 Kan. 220, 137 Pac. 793; *Wallace v. Mutual, etc., Ins. Co.* (1906) 97 Minn. 27, 106 N. W. 84 (suit by husband to compel divorced wife to relinquish policy); *Overheiser v. Overheiser* (1900) 63 Oh. St. 77, 57 N. E. 965 (suit by second wife against first wife to obtain proceeds of the policy); *White v. Brotherhood* (1904) 124 Iowa 293, 99 N. W. 1071 (*semble*); *McGrew v. Mutual Life Ins. Co.* (1901) 132 Cal. 85, 63 Pac. 103; *Grego v. Grego* (1900) 78 Miss. 443, 28 So. 817; *Phoenix, etc., Ins. Co. v. Dunham* (1878) 46 Conn. 79; *Marquet v. Aetna Life Ins. Co.*, *supra*, footnote 148; *Humphrey v. Mutual Life Ins. Co.* (1915) 86 Wash. 672, 151 Pac. 100. *Contra*: *Hatch v. Hatch* (1904) 35 Tex. Civ. App. 373, 80 S. W. 411 (controversy between husband and wife over cash surrender value); *Northwestern, etc., Ins. Co. v. Whiteselle* (Tex. Civ. App. 1916) 188 S. W. 22; *Western, etc., Ins. Co. v. Webster* (Ky. 1916) 189 S. W. 429. *A fortiori*, a divorce *a mensa et thoro* does not affect the wife's right. *Supreme Council, etc. v. Smith* (1889) 45 N. J. Eq. 466, 17 Atl. 770. The husband's obligation under a judgment for alimony, or his duty to reimburse the wife for the support of their children, gives her a new insurable interest as creditor. *McKee v. Phoenix Ins. Co.* (1859) 28 Mo. 383 (*semble*). Statutes governing mutual benefit or fraternal insurance frequently provide that the beneficiary must be a "dependent" of the *cestui* at the time of the latter's death; a divorced wife is not such a dependent. *Tyler v. Odd Fellows, etc., Ass'n.* 145 Mass. 134, 13 N. E. 360.

the Statute of Limitations has run,¹⁵² or that the debtor has been discharged in bankruptcy,¹⁵³ or even by the fact that the debt has been completely extinguished by payment or accord and satisfaction.¹⁵⁴

Since a continuing insurable interest is not necessary, it should make no difference whether the insurable interest of the beneficiary ceases to exist through external circumstances (as divorce), or because the contract is assigned to a new beneficiary having no interest.¹⁵⁵ The policy is a chose in action, a species of property, and it will be of slight value if not transferable.¹⁵⁶ The preponderance of authority favors the assignee's recovery,¹⁵⁷ yet the greatest confusion exists on this point. The diversity of opinion is traceable to three distinct sources.

First, an apprehension that an incipient insurable interest is not a sufficient safeguard.¹⁵⁸ The arguments *contra* were noticed above. An examination of the cases discloses that this view may be traced to an "overruled" *dictum*¹⁵⁹ and two overruled decisions.¹⁶⁰

Secondly, a fear that the assignment will be used to evade the requirement as to insurable interest. This fear is well founded and, when the principle is sensibly applied, it constitutes no exception to the general rule that an incipient interest is sufficient. What are the possibilities of evasion? (1.) Where the policy is procured by the *cestui* on his own initiative and at once assigned by him to a person having no insurable interest, there can be no "evasion", for since the *cestui* could have designated a stranger as beneficiary in the first place, surely there can be no objection to

¹⁵²*Rawles v. American Life Ins. Co.* (1863) 27 N. Y. 282; *Mowry v. Home Life Ins. Co.* (1869) 9 R. I. 346, 353.

¹⁵³*Ferguson v. Mass., etc. Ins. Co.* (N. Y. 1884) 32 Hun 306; *aff'd.* 102 N. Y. 647.

¹⁵⁴*Dalby v. Life Ass. Co.*, *supra*, footnote 40 (accord and satisfaction); *Rittler v. Smith*, *supra*, footnote 119 (*semble*); *Corson's Appeal*, *supra*, footnote 119.

¹⁵⁵*Parker, C. J.*, in *Steinbach v. Diepenbock*, *supra*, footnote 70.

¹⁵⁶*Sanborn, J.*, in *Gordon v. Ware Nat'l. Bank* (C. C. A. 1904) 132 Fed. 444, 447.

¹⁵⁷Numerous cases are collected in a note in 3 L. R. A. (N. S.) 934, 942; see also 6 *ibid.* 128, note.

¹⁵⁸*E. g.*, *Adam's Adm'r. v. Reed* (Ky. 1896) 36 S. W. 568.

¹⁵⁹*Warnock v. Davis*, *supra*, footnote 72. See *Vance, op. cit.* 143; article by Edwin S. Maxey in 20 Green Bag 232.

¹⁶⁰*Franklin Life Ins. Co. v. Hazzard* (1872) 41 Ind. 116; *Stevens v. Warren* (1869) 101 Mass. 564.

his accomplishing this result in two steps instead of one.¹⁶¹ If the *cestui* acts solely upon his own initiative, it can make no difference whether or not the assignment was contemplated when the policy was procured. Yet some courts recognize the rule that a person procuring a policy on his own life may designate anyone as beneficiary, while adhering to the view that an assignee must under all circumstances have an insurable interest.¹⁶² (2.) Where the beneficiary (having no interest) obtains complete control of the policy procured by the *cestui*, intending at once to assign it to a person whom the *cestui* would never consent to have as beneficiary in a policy on his life, the *cestui's* consent is vitiated by fraud, and the transaction violates the rule that a person having no insurable interest may not procure a policy without the consent of the *cestui*.¹⁶³ (3.) Where the policy is procured with a view to immediate assignment and upon the initiative of the prospective assignee, the transaction violates the rule that a beneficiary having no interest must not be the active or moving party in procuring the policy.¹⁶⁴ (4.) Where the policy is procured by a beneficiary having a valid insurable interest and immediately assigned by such beneficiary to a person having no insurable interest the transaction is evasive and the assignment at least is void.¹⁶⁵

(5.) Finally, a person who takes the initiative in procuring a policy to be issued upon the life of another may evasively pretend to have an insurable interest by reason of a small debt (small in proportion to the amount of the policy),¹⁶⁶ or of a gratuitous promissory note executed by the *cestui*.¹⁶⁷ The Pennsylvania courts, attempting to define this "disproportion theory", have adopted a rule that the amount of insurance taken out by a creditor on his debtor's life must be limited to "the amount of the debt, with interest, and the amount of premiums, with interest thereon, dur-

¹⁶¹See *Rylander v. Allen* (1906) 125 Ga. 206; 53 S. E. 1032; *Hardy v. Aetna Life Ins. Co.* (1910) 152 N. C. 286, 67 S. E. 767.

¹⁶²See, for instance, *Dolan v. Supreme Council*, *supra*, footnote 56; *Rupp v. Western Life Indemnity Co.*, *supra*, footnote 71.

¹⁶³See *Ruth v. Katterman*, *supra*, footnote 87.

¹⁶⁴See cases cited in footnotes 87 and 88.

¹⁶⁵*Hoffman v. Hoke* (1888) 122 Pa. 377, 15 Atl. 437.

¹⁶⁶*Cammack v. Lewis* (1872) 82 U. S. 643, is the classic example. There Lewis at Cammack's suggestion procured a policy for \$3000 on his life and immediately assigned it to Cammack, to whom he owed \$70. Cammack paid all the premiums. The court pronounced it a wager.

¹⁶⁷In *Cammack v. Lewis*, *supra*, footnote 166, Lewis gave Cammack a \$3000 note, which was conceded to be gratuitous. See *Brockway v. Mutual, etc., Ins. Co.*, *supra*, footnote 98.

ing the expectancy of life as shown by the Carlisle tables".¹⁶⁸ This rule is clearly inapplicable to a "term" policy (as in *Cammack v. Lewis*),¹⁶⁹ and since on a whole life policy the amount of premiums, with interest, during the expectancy of life, will practically equal or exceed the face of the policy, it is not a workable theory. Aside from this, the rule is an attempt to reduce to mathematical certainty the question of the evasion of a principle which is itself none too clearly defined. If we have a fixed rule against evasion, why not another fixed rule to determine when the rule against evasion is being evaded?—for human ingenuity is boundless in its capacity for evading fixed rules. The better view would seem to be that the court must determine from the facts in each case whether or not the principle requiring an incipient interest is violated, and that disproportion of debt is an important but not the only factor to be weighed in the scale.¹⁷⁰

Where the assignment is wholly unconnected in thought and in purpose with the issuance of the policy, the assignment is not evasive of the rule requiring an incipient insurable interest, and the decided weight of authority favors the view that the assignee need have no interest, regardless of whether or not he pays the premiums and regardless of whether or not he pays an "adequate" consideration for the assignment. The United States Supreme Court is the latest convert to this view. In *Grigsby v. Russell*,¹⁷¹ one Burchard had procured a policy upon his life, payable to his representatives, and had paid two annual premiums. Being in need of money, he sold the policy to Dr. Grigsby for \$100, the latter agreeing to pay the premiums. After Burchard's death the insurance company interpleaded the assignee and Burchard's administrator. The Supreme Court held that the assignee could recover the amount of the policy, reversing the decision of the Circuit Court of Appeals.¹⁷² The opinion by Holmes, J., distinguishes *Warnock v. Davis* on the ground that there the policy was "taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit" by assigning it at once. This case puts *Warnock v. Davis* in its proper place; and the

¹⁶⁸First suggested by Paxson, J., in *Grant's Adm'rs. v. Kline*, *supra*, footnote 119. In *Wheeland v. Atwood* (1899) 192 Pa. 237, 43 Atl. 946, it was applied to a case where the assignment was clearly not evasive.

¹⁶⁹*Supra*, footnote 166.

¹⁷⁰*Rittler v. Smith*, *supra*, footnote 119.

¹⁷¹*Supra*, footnote 29.

¹⁷²(C. C. A. 1909) 168 Fed. 577.

practical effect is to uproot the misleading dictum of Field, J., that a continuing interest is necessary. The following excerpts from the opinion of Mr. Justice Holmes are luminous:—

“A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists * * * the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps is more important, the existence of such an interest makes a roughly selected class of persons who by their general relations with the person whose life is insured are less likely than criminals at large to attempt to compass his death.

“But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case: * * * not only does the objection to wagers disappear, but also the principle of public policy referred to, at least in its most convincing form. The danger that might arise from a general license, to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. * * *

“On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. * * * To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only, *Goodsall v. Boldero*, 9 East 72, long has disappeared. * * * And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith.”

A third source of confusion has been the failure to apply with discrimination certain principles of the law of mortgages and pledges. If A, owing B a debt, transfers property to B, who pays nothing therefor, the debt will remain unless the transfer amounts to an accord and satisfaction; and this is a question of fact to be determined in each case. If the debt is not extinguished in this way, a court of equity will usually treat the transfer as a mortgage or pledge. Especially is this true where the value of the property greatly exceeds the amount of the debt. In such cases, uncontrolled by the form of the transfer, whether absolute or conditional, and regardless of whether or not the condition, if any, has been strictly performed, equity will, to prevent the unjust enrichment of the creditor, fasten a constructive trust upon him, and allow him to use his title only for the purpose of collecting his debt.

In applying these principles to a transfer of a life insurance policy by a debtor to his creditor, great difficulty is encountered. What is the value of the property transferred? If the debtor pays all the premiums, it may be taken as the amount of the policy; such an assignment will usually be treated as a mortgage. If, however, the creditor is to pay *all* the premiums, the value of the property transferred is nothing, and, if the transaction is not evasive, the creditor should be allowed to keep all that he collects,¹⁷³ unless there is strong evidence that the assignment is conditional.¹⁷⁴ Finally, where the debtor assigns the policy after paying several premiums, the creditor paying the remainder, the value of the property will depend upon the amount already paid in premiums and the court will have to determine, as in other cases, from all the circumstances, whether the assignment was absolute¹⁷⁵ or conditional.¹⁷⁶ These principles have nothing to do with insurable interest, as such; yet one finds many security assignments discussed as if a question of insurable interest were involved.¹⁷⁷ Thence,

¹⁷³Appeal of Corson, *supra*, footnote 119; Grant's Adm'rs. v. Kline, *supra*, footnote 119; Rittler v. Richards, *supra*, footnote 119.

¹⁷⁴As in Mutual Life Ins. Co. v. Richards (1903) 99 Mo. App. 88, 72 S. W. 487. Cf. Amick v. Butler, *supra*, footnote 119, where the assignment was conditional, but the court said the debtor had a mere option to regain the policy by paying the debt, as distinguished from an equity of redemption. The creditor paid all the premiums.

¹⁷⁵Givens v. Veeder (1897) 9 N. M. 256, 50 Pac. 316.

¹⁷⁶First Nat'l. Bank v. Terry's Adm'r. (1901) 99 Va. 194, 37 S. E. 843.

¹⁷⁷See for example: Exchange Bank v. Loh, *supra*, footnote 5; Wheeland v. Atwood, *supra*, footnote 168; Roller v. Moore's Adm'r. (1889) 88 Va. 512, 10 S. E. 241. See also, Vance, *op. cit.* 141-143.

perhaps, comes the notion that under no circumstances can a creditor become the absolute owner of a policy on his debtor's life,¹⁷⁸ and the practice of treating an evasive absolute assignment to a creditor,¹⁷⁹ or other evasive assignment,¹⁸⁰ or any assignment in jurisdictions where all assignees must have an interest,¹⁸¹ as giving the assignee a right of recovery to the extent of his debt or purchase money (if any) and the amount paid by him in premiums.

In conclusion, it may be said that the doctrine of insurable interest in life insurance, as applied by American courts, is not a single rule, but is a complex of rules of public policy designed to avert a number of harmful social and economic tendencies. Freedom of contract and of gift is still the underlying principle; it will be set aside only when the harmful tendencies of unrestricted freedom become substantial, as opposed to *nil* or negligible. The courts do not require that every contract, certainly not that every life insurance contract, should manifest a social purpose. On the other hand, in applying the principle of exclusion, the court looks not at the purpose or tendency of the individual contract, but at the tendency of contracts of that class. The test of harmfulness is empirical, and the results of its application may well vary with the changing state of society itself.

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¹⁷⁸*Lewy v. Gilliard* (1890) 76 Tex. 400, 13 S. W. 304; *Goldbaum v. Blum*, *supra*, footnote 71; *Exchange Bank v. Loh*, *supra*, footnote 5.

¹⁷⁹*Strode v. Meyer Bros. Drug Co.* (1903) 101 Mo. App. 627, 74 S. W. 379, where the policy was \$5000, the debt \$111; the creditor induced the debtor to take the policy and paid all the premiums.

¹⁸⁰*Warnock v. Davis*, *supra*, footnote 72; *Bendet v. Ellis*, *supra*, footnote 87.

¹⁸¹*Schonfield v. Turner* (1889) 75 Tex. 324, 12 S. W. 626.

TREATIES.¹

A treaty occupies very much the same place in international law that a contract does in municipal law. Although there is a strong analogy between the two, it is not to be pushed too far, and, like all analogies, must be handled with caution. The principal distinction lies in the circumstance that a contract is enforced by the political power of the state, whereas, there is no political power external to the independent states of the world to enforce treaties between them. Persons, therefore, accustomed to the binding force of contracts frequently are unable to understand why a treaty is not as binding, and are startled at the spectacle of an independent state disregarding its treaty obligations. A true view of international relations will disclose that such breaches are to be expected, and however blameworthy on the ground of morality or ethics, may be explained as a temporary change in the ordinary equipoise of the external factors influencing independent state conduct.

The Great War, now raging in Europe, has not, as has been thought by persons unfamiliar with the subject, destroyed international law. A law as it exists even in municipal life is none the less a law because it is sometimes violated. If A murders B, the law against murder still remains, and even if a riot occurs in which a number of persons lose their lives, the law is still not destroyed.

The purpose of this article is to attempt a brief outline of the international law of treaties and assist the reader in forming an intelligent opinion on a subject of much interest at the present time.

The subject will be discussed under the headings of: (A) Definition and Form, (B) Classification, (C) Parties, (D) Formation, (E) Obligation, (F) Excuse for Non-performance, (G) Effect of War, (H) Effect of Birth, Extinction and Merger of States, (I) Interpretation, (J) Effect on Independence, (K) Law-making Effect.²

¹All rights reserved. This article forms part, in a condensed form, of a treatise on International Law now in course of preparation. If, therefore, it has the aspect, so to speak, of hanging in the air, the reader will know what the reason is.

²Hall, *Int. Law*, 6 ed., (1909) p. 317, says treaties may be considered with reference to: (1) the antecedent conditions upon which their validity depends, (2) their forms, (3) their interpretation, (4) their effects, (5) certain means of assuring their execution, (6) the conditions under which they cease to be obligatory, (7) their renewal.

DEFINITION AND FORM.

A treaty may be defined as an agreement between two or more states to do or not to do a particular thing. It must therefore be entered into by states, and an agreement between them is essential. A number of definitions have been collected in the note, most of which, it will be observed, attempt too much, and, as a result, limit the definition.³

Although the opinion has been advanced that a treaty must be in writing,⁴ it seems to have no foundation in reason. The transaction is too important to be left to the fleeting memory of the negotiators, and the universal practice is to reduce the treaty to documentary form.

Treaties were universally in the Latin language until the middle of the seventeenth century, after which French was employed.

³Some of the definitions of a treaty which have been offered are as follows:

"International Treaties or Conventions are agreements or contracts between two or more States, usually negotiated for the purpose of creating, modifying, or extinguishing correlative rights and reciprocal obligations." Hershey, *Int. L.*, (1912) p. 311.

"Treaties, allowed under the law of nations, are unconstrained acts of independent powers, placing them under an obligation to do something which is not wrong," Woolsey, *Int. L.*, 5 ed. (1878) p. 166.

"A treaty, or, to employ ancient terminology, a public treaty, is a convention agreed upon between two or more political communities." Ernest Nys, *American J. Int. L.*, Vol. 6, p. 282.

"A treaty * * * is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time." Vattel, *Chitty's Trans.* (1861) Book II § 152.

"International treaties are conventions or contracts between two or more States concerning various matters of interest." 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 540.

"Treaties * * * are the written portions of that Law which binds together the Society of States, and they occupy a place in that system, which, in some degree, corresponds to the place occupied by statutes in the system of the Municipal and Public Law of Independent States." 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 69.

"*Treaties*, properly so called, or *foedera*, are those of friendship and alliance, commerce, and navigation, which, even if perpetual in terms, expire of course:—(1) In case either of the contracting parties loses its existence as an independent State. (2) Where the internal constitution of government of either State is so changed, as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded. * * * (3) In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture," Wheaton, *Elements*, Dana's ed. (1866) pp. 351, 352.

"Express covenants made between nation and nation are called public covenants or treaties. The covenants which the sovereign makes as a private person, or those which he makes as a sovereign, but with private persons (as private persons) do not take the name of treaties." Martens, *Int. L.*, Cobbett's *Trans.* (1795) Book II. Ch. 1, § 2.

⁴2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 78; Martens, *Int. L.*, Cobbett's *Trans.* (1795) Book II, Ch. 2, § 3.

The usage now is for states having different languages to have treaties drawn up in the language of each in parallel columns.

The choice of words and arrangement of parts is entirely in the discretion of the parties, although, as may be expected, the force of custom and precedent imposes on treaties a certain formal aspect and arrangement.⁵

Treaties have been designated by various names, as follows: Acts,⁶ Armistices,⁷ Cartels,⁸ Capitulations,⁹ Concordats,¹⁰ Conventions,¹¹ Declarations,¹² *Modus Vivendi*,¹³ *Pactum de Contra-*

⁵1 Oppenheim, Int. L., 2 ed. (1912) 552.

⁶The term "act" was applied to the various paragraphs of the provisions of the treaty of Vienna, and has been applied in a similar provision in other general treaties. The term, however, seems to be of little application and had best be discarded.

⁷An armistice differs from a truce in that in an armistice there is not only a cessation of hostilities but an agreement between the parties as to certain points. It is more in the nature of a local treaty between the commanders of the opposing forces entered into for the purpose of suspending hostilities.

⁸"Cartels are a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility shall be carried out." Hall Int. Law 6 ed. (1909) pp. 545-546.

⁹"A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions. The arrangement is a bargain made in the common interest of the contracting parties, of which one avoids the useless loss which is incurred in a hopeless struggle, while the other, besides also avoiding loss, is spared all further sacrifice of time and trouble and is enabled to use his troops for other purposes." Hall Int. Law 6 ed. (1909) p. 547.

¹⁰A concordat is an agreement between the Pope and an independent state concerning the affairs of the Church in such independent state. These are now only entered into by Catholic States. See 1 Halleck, Int. L., 4 ed. (1908) p. 302 n. For further discussion of Concordats, see 2 Philimore, Int. L., 3 ed. (1879-1888) p. 427.

¹¹Conventions. The term convention is indiscriminately applied to treaties but perhaps more usually to the various subdivisions of the general rules adopted at international congresses. Thus, the important rules adopted at the First and Second Peace Conferences at the Hague are called "conventions"; so also the result of the deliberations at the Red Cross Congress at Geneva. "Treaties and conventions are practically synonymous, although the latter term is probably applied more frequently to treaties of lower importance." Hershey, Int. L., (1912) p. 311 n.

¹²A declaration, properly speaking, is a unilateral act setting forth the intention or resolution of the party signing it, and has no binding validity unless accepted or adopted by some other party, and does not from its form necessarily contemplate such adoption as in the case of a contract. The results of several important conferences of international delegations have been designated as declarations, for example, the Declaration of St. Petersburg, in 1856; Declaration of London, in 1909. The contents of such declarations are not to be distinguished on principle from those containing the convention laid down at the Hague, and there really seems to be no reason why the word "declaration" should be used any longer, though its meaning as to these particular historical events has become fixed.

¹³*Modus Vivendi* are agreements to carry on an existing state of affairs pending a final determination.

hendo,¹⁴ Preliminary Treaties,¹⁵ Protocols,¹⁶ *Punctationes*,¹⁷ *Sponsions*,¹⁸ Truces.¹⁹

Most of these names have a technical significance and are explained in the notes. In a few cases there is an obscurity, but in most cases the meaning is sufficiently clear.²⁰

¹⁴*Pactum de contrahendo* "is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties." 1 Oppenheim, Int. L., 2 ed. (1912) p. 547.

¹⁵"Preliminaries of peace are an agreement intended to put an end to hostilities at an earlier moment than that at which the terms of a definitive treaty can be settled. They contain the stipulations which are essential to the re-establishment of peace, together sometimes with arrangements having a temporary object; minor points which lie open to discussion or bargain, and details for the settlement of which time is required, being held over for more leisurely treatment. Preliminaries thus constitute a treaty which is binding in every respect so far as it goes, but which is intended to be superseded by a fuller arrangement, and is so superseded when the definitive treaty is signed. For an example of preliminaries and of a definitive treaty of peace, see the Preliminaries of Versailles and the definitive Treaty of Frankfurt in D'Angeberg, Nos. 1119 and 1179." Hall Int. Law 6 ed. (1909) p. 555, n. 1.

"A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later. Such preliminary treaty is a real treaty and therefore binding upon the parties." 1 Oppenheim, Int. L., 2 ed. (1912) pp. 546, 547.

¹⁶"Protocols" are preliminary agreements entered into before the signing of the treaty itself. "During the negotiations for a treaty the discussion of each sitting and the resolutions arrived at are set down in a document called a Protocol." Hall Int. Law 6 ed. (1909) p. 321, n. 3.

¹⁷*Punctationes* are "mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty." 1 Oppenheim, Int. L., 2 ed. (1912) p. 546.

¹⁸*Sponsions*. "Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*." Wheaton, Elements, Dana's ed. (1866) p. 329.

"By the Latin term *sponsio* we express an agreement relating to affairs of state, made by a public person who exceeds the bounds of his commission, and acts without the orders or command of the sovereign." Vattel, Chitty's Trans. (1861) Book II § 208.

¹⁹Truce. A truce is a cessation of hostilities between opposing military forces which may be only temporary or may continue until the termination of the war. It is generally of a local character confined to commanders of small bodies of troops, although it may be entered into by the commander-in-chief of the entire army.

²⁰Hall Int. Law, 6 ed. (1909) p. 317, n. 1, says:

"Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are of course not subjects of international law. Of this kind are—(1) Concordats, because the Pope signs them not as a secular prince, but as head of the Catholic Church. (2) Treaties, of which the object is to seat a dynasty or a prince upon a throne, or to guarantee its possession, in so far as the agreement is directed to the imposition of the dynasty or prince upon the state for reasons other than strictly international interests, or to their protection against internal revolution, because such contracts are in the interest of the individuals in their personal capacity, and not in their capacity as representatives of the will of the state. (3) Agreements with private individuals, e. g. for a loan. (4) Arrangements between different branches of reigning houses,

CLASSIFICATION.

The writers on international law have classified treaties under some one or more of the following terms: Alliance,²¹ Amity and Friendship,²² Arbitration, Association,²³ Boundary,²⁴ Cession,²⁴ Confederation,²⁵ Commerce,²⁶ Dispositive,³¹ Equal and unequal,²⁷ General, Guarantee,²⁸ Law Making, Peace,²⁹ Private, Public,

or between the reigning families of different states, with reference to questions of succession and like matters."

Roman civilians divided all international contracts into three classes: *Pactiones*, *Sponsiones* and *Foedera*. Wheaton, Elements, Dana's ed. (1866) p. 329, n. a.

"The compacts which have temporary matters for their object are called agreements, conventions, and pactions". Vattel, Chitty's Trans. (1861) Book II § 153.

²¹"Treaties of alliance are, on the contrary, usually entered into for the purpose of common security and general defence, but without reference to any particular power or to any special event." 1 Halleck, Int. L., 4 ed. (1908) pp. 305, 306; see, Wheaton, Elements, Dana's ed. (1866) pp. 355, 364. They have also been divided into real and personal alliance, equal and unequal, general and special, defensive and offensive.

²²Ancient name for treaties providing simply for mutual intercourse and friendship. 1 Halleck, Int. L., 4 ed. (1908) p. 306.

²³"Treaties of association are usually made for the purpose of war, two or more states associating themselves together for the purpose of carrying on joint operations against a common enemy." 1 Halleck, Int. L., 4 ed. (1908), p. 305.

²⁴Boundary and cession treaties are those providing for a boundary between two or more states or calling for a cession of state territory. Discussed in Halleck, Int. L., 4 ed. (1908) pp. 306, 307.

²⁵"Treaties of confederation are usually made for the purpose of forming a union more or less close in reference to certain special objects with respect to internal or external matters." 1 Halleck, Int. L., 4 ed. (1908) p. 305.

²⁶Treaties of commerce are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse. 1 Halleck, Int. L., 4 ed. (1908) p. 307.

²⁷Equal and unequal. "Equal treaties are where the contracting parties promise the same or equivalent things; and unequal treaties are where the things promised are neither the same nor equitably proportioned". 1 Halleck, Int. L., 4 ed. (1908) p. 304; see Vattel, Chitty's Trans. (1861) Book II § 172. Sometimes spoken of as bilateral or unilateral. To be distinguished from equal and unequal alliances, which distinction relates to the dignity or rank of the states concerned. 1 Halleck, Int. L., 4 ed. (1908) p. 304.

²⁸Guarantee * * * "is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights, by a third power." Wheaton, Elements, Dana's ed. (1866) p. 354. "Treaties of guarantee are agreements through which powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction by the use of such means as may be specified or required against a country acting adversely to such stipulations." Hall Int. Law 6 ed. (1909) p. 334.

Cases of treaties of guarantee: (a) Treaty of Tilsit, by which Germany and Russia guaranteed to each other the integrity of their respective possessions. Hall Int. Law 6 ed. (1909) p. 334; Woolsey, Int. L., 5 ed (1878) p. 174. (b) Treaty of April 13, 1856, by which Great Britain, Austria and

Recognition,³⁰ Special, Subsidy, Succor, Transitory.³¹

Most of these terms are self-explanatory, some have been further discussed in the notes. They relate to the diplomatic or the political aspects of the treaty, which questions lie entirely outside the discussion, although the writers frequently refer to them at length.³²

France guaranteed "jointly and severally the independence and integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th of March". (Hall, *op. cit.* 335) (c) Treaty of 1831 and 1839, by which Belgium was constituted an independent and neutral state, the several states guaranteeing the neutrality. (d) 1855, Treaty by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory of the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever in consideration of a guarantee by Great Britain and France of the Swedish and Norwegian territory. (Hall, *op. cit.* 335.) See also 1 Halleck, *Int. L.*, 4 ed. (1908) pp. 304, 312, 313. 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 84 *et seq.*; Woolsey, *Int. L.*, 5 ed. (1878) p. 174.

³⁰"When the belligerent powers have agreed to lay down their arms, the agreement of contract in which they stipulate the conditions of peace, and regulate the manner in which it is to be restored, is called the *treaty of peace*." Vattel, Chitty's Trans. (1861) Book IV § 9.

³⁰Treaties of recognition have for their object the admission of a new member of the family of nations or the recognition of a new title. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 306.

³¹A transitory or dispositive treaty is one "which disposes of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating a right of way over it in the grantee". 1 Westlake, *Int. L.*, 2 ed. (1910) pp. 60, 61. Such are treaties of cession. Continuing, the same author says that they are so called because this effect passes over into and forms part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact without being always obliged to refer to the dealings which created it. He admits the term is bad because the word "transitory" does not suggest permanency, yet the operation of the treaty is usually most permanent, and the best word is dispositive. In plain English, what all this means is that some treaties call for immediate performance, and when that is done, the treaty is executed—*functus officio*—and we have only to deal with an altered state of facts resulting from the performance. In the simple language of the municipal law, the treaty is fully executed. See also, Westlake, *Int. L.*, 2 ed. (1910) p. 294.

³²Pradier Fodere, II. Nos. 920, *et seq.* (quoted in Hershey, 311, n. 2), divides treaties as follows: General treaties; Treaties of peace, Political union, Alliance, Guarantee and protection, Neutrality, Cession, Commerce, Unions and Customs. Special treaties: Concordats, Boundary treaties, Treaties establishing servitudes, Treaties of navigation, Consular conventions and capitulations, Conventions relating to literary and artistic property, industrial property, extradition treaties, postal, and telegraphic conventions, and conventions relating to railroads. Hershey (*op. cit.* 311, n. 2) divides treaties into executed or executory, transitory or continuing, dispositive or permanent; and, on p. 312, into simple or conditional, unilateral or bilateral, preliminary or definitive, accessory or additional, subsidiary or principal. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, p. 541, divides treaties into law-making and treaties concluded for all kinds of other purposes. See Hall, *op. cit.* 353, n. 1, for review of the classifications of some

A distinction has been drawn between treaties real, which bind the contracting parties (i. e. the states), independently of any change in the rulers, and treaties personal, which are such as are made with a view to the person of the ruler and only bind the state during his continuance in office.³³

The constitution of a federal government, like that of the United States of America or of Switzerland, is formed by the union of several states. Sometimes these states were formerly independent, sometimes they simply passed from one state of dependence to the new state of dependence in the federal union. The compact between them is called a constitution and is an agreement between several states. It is to be distinguished from a treaty in that it sets up a new state and prescribes the form of government thereof; that is, it constitutes a state government, whereas, a treaty simply contemplates action of the parties to it as parties without setting up any superior political power. In the case of a constitution, the government is the result of the execution of the treaty between the states, and the preliminary agreement drops of the authors. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2 p. 70, considers treaties:

(1) As to the subject, whether they relate to a matter of natural right or whether they contain some obligation as to what was previously indifferent.

(2) With respect to their object.

(3) With respect to the contracting parties, whether they are:

(a) Both Christian

(b) Christian and infidel

(c) Christian and Mohammedan

(d) Within or without Europe

(4) With respect to the time in which contracted.

(a) Whether before or after the Treaty of Westphalia (1648)

(b) Whether before or after the Treaty of Utrecht (1713)

(c) Whether before or after the period of the Treaty of Utrecht to the outbreak of the French Revolution (1791)

(d) Whether during twenty-five years of the Napoleonic wars

(e) Whether between that period and the present (1882).

(5) Certain international engagements, as contracts between the State and a private individual of another country, and contracts relating to the private affairs of the sovereign are not treaties.

(6) Treaties also to be considered with respect to their action and object.

"General compact between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed." Wheaton, *Elements*, Dana's ed. (1866) p. 340. The first are perpetual in their nature, so that once being carried into effect, they subsist, independent of any change in the government, and although their operation is suspended during war, they are ratified on return of peace, *e. g.*, treaties of cession, boundary, exchange of territory.

³³This distinction was laid down by Vattel, *Vattel*, Chitty's Trans. (1861) Book II § 183-197 and was adopted by Wheaton. *Elements*, Dana's ed. (1866) pp. 43 *et seq.*, 351, 352; 1 Halleck, *Int. L.*, 4 ed. (1908) pp. 302, 303, but is now obsolete according to Hershey. *Int. L.*, (1915) p. 311, *n.* 2.

out of sight and the new state as an entity is alone left in view, just as the engagement to marry is a contract which is fully executed and disappears as a result of the marriage. It ought not be necessary to mention this point, but some writers have referred to these constitutions as treaties, and it therefore seems advisable to refer to the subject.

It will be observed that the numerous classifications of treaties which have been adopted by the various authors confuse two important classifications which are independent of each other, and should therefore be separately discussed. The one is the classification of treaties with respect to the performance; that is, whether fully performed or not performed. The other, the classification with respect to the objects contemplated by the treaty. The latter classification can never be exhaustive as the changing aspect of international affairs will continually present new objects of international agreements. Since states are parties to treaties and state conduct only is involved in the international world, every treaty will relate to state conduct and these treaties may be classified with respect to the particular objects, as follows:

- (1) Those relating to state territory, as treaties of boundary and cession, and neutralization of particular places.
- (2) Those relating to political conduct of states to each other and with respect to third states.
- (3) Those relating to the open sea.
- (4) Those relating to the treatment of members of one state within the jurisdiction of another.
- (5) Those providing for exercise of state functions by one state on the territory of another.
- (6) Those providing for joint administrative functions.
- (7) Those providing for identity of private municipal law or providing for regulation of conflicts therein.
- (8) Those applying to a third state.
- (9) Those relating to a state of war between the parties.

PARTIES TO A TREATY.

Is there any distinction to be drawn between states as to their capacity to enter into a treaty? Incapacity is physical,—as insanity,—and legal, as the case of a married woman in English common law. Such legal incapacity, however, arises only because there is a political power to enforce it, is purely artificial, and cannot exist in the world of independent states where there is no political superior. Several cases present themselves concerning: A. independent states, which are to be divided into three classes—(1) those members of the family of nations, (2) those not mem-

bers, and (3) those, in either case, where there is a paralysis of government,—B. dependent states.³⁴

An independent state, a member of the family of nations, with a government in full force, no matter what its form, undoubtedly has full capacity to make a treaty. No suggestion to the contrary has ever been made. If the government of an independent state is paralyzed or has disappeared by reason of anarchy or other internal cause, there is no political organization to represent the community of the people in international life, and consequently no state which can enter into a treaty. Such cases are not of frequent occurrence, and when they do occur are of short duration, and therefore such incapacity has no very serious effect upon the international life of states.³⁵

Down to the beginning of the nineteenth century, when the princes of Europe were the only recognized members of the family of nations, the notion was strongly entertained that a distinction was to be drawn as to treaties made with powers outside the membership. Prior to the successful culmination of the Reformation, treaties with non-Christian states were also distinguished. The distinction in each of these two cases did not actually go to the length of maintaining that no treaty should be made, but only to the application of the principle that such treaties were not binding. The Christian princes of Europe did not hesitate to enter into treaties with the formidable Ottoman Porte whenever induced by force or self-interest, and made light of evading them whenever it was possible and advantageous. The idea of religious exclusiveness has long since disappeared and is now a matter only of historical interest. The snobbishness of kings, however, still cultivated the idea of the inferiority of states not members of the family of nations, and treaty obligations with such were regarded very much as the fashionable fop considers his tailor bill.

Traces of this notion are still to be found in the writers. The practice of the international world has fully dissipated any idea that such treaties are unequal or of less obligation than others. The circle of the family of nations, furthermore, has so widened that

³⁴The notion, which was formerly urged, that a state could not enter into a treaty with another state professing a different religion, is now obviously merely of historic interest. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 294 n; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 74; Vattel, *Chitty's Trans.* (1861) Book II § 162.

³⁵Thus the present state of anarchy in Russia seems to present a case where there is no government which can be definitely pointed out as representing the community. The same thing occurred for a while during the French Revolution.

to-day it includes all independent states of the world of any importance and treaties are freely made with a few independent ones still outside the charmed circle.

In the case of a dependent state, the only question is whether the political tie between it and the independent state on which it is dependent eliminates it from international life to such an extent as to inhibit the treaty-making functions.³⁶

This, therefore, is solely a question of municipal law to be determined by an examination of the constitution of the state.³⁷

In the case of a revolted or insurgent state, where the parent state has not recognized its independence, and there is some doubt as to whether it will ever become a state, a question will arise as to its capacity to make a treaty. Although serious difficulties may arise through this state of facts in connection with the questions of recognition, sending of diplomatic envoys and observance of neutrality, the question as to a treaty will not often arise until it has established its independence, and while other states may recognize the independence or the belligerency of such a body, such recognition is not necessarily followed by the conclusion of a treaty.

The making of a treaty with such a body is solely a question of discretion with the independent state concerned, and the parent state is the only party which can complain.³⁸

Some writers speak of a right to make a treaty, in which they are probably using the word "right" in the sense of power. Since

³⁶ "All contracts therefore are void which are entered into by such states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states." Hall Int. Law 6 ed. (1909) p. 318.

³⁷ Halleck, Int. L. 4 ed. (1908) pp. 289, 294.

Member states of Switzerland may conclude non-political treaties among themselves and treaties with foreign states concerning matters of police, local, traffic and state economics.

Member states of German Empire may by Article II. of the Constitution of the German Empire conclude treaties as to all matters not confided to the Empire by Article IV. 1 Oppenheim, 544, *n.* 1.

Member states of the United States, by the Constitution of the United States, Art. I. Sec. 10, (1) are prohibited from entering "into any treaty, alliance or confederation, and by Art. I, Sec. 10, (2) "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into an agreement or compact with another state or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay."

On March 17, 1897, the then South African Republic entered into a treaty of alliance with the Orange Free State, although the former state was said by Great Britain to be a semi-sovereign state under British sovereignty. 1 Halleck, Int. L., 4 ed. (1908) p. 295, *n.* 1.

³⁸ In 1778, France, and in 1782, the United Netherlands, respectively, made treaties with the revolted American colonies.

an independent state has no political superior, the word "right" in a technical sense of the municipal law cannot be applied to any state act.³⁹ In what other sense it can be used in this connection does not clearly appear.

A dependent state having no part in international life, and therefore subject to municipal law, has no right to make a treaty in the correct sense of the word, because it is restrained by the superior political power of the independent state upon which it is dependent.

FORMATION.

The treaty-making function is exercised by the organs of the state having that power, by negotiation, by which the terms of the proposed treaty are discussed and agreed upon, and then by the actual execution of the document itself. The organ or organs of states, charged with the duty of exercising the function, and their powers, are prescribed by the municipal law.⁴⁰ Formerly, the power was a personal prerogative of the prince. In democracies and limited monarchies the representatives of the people as determined by the municipal constitution, participate in the exercise of the function.⁴¹ Where, as in most cases, several different branches of the government have a hand in the matter, a certain amount of delay and difficulty will sometimes inevitably occur.

The primary function of forming the treaty is usually vested in the chief executive or head of the state, who generally conducts negotiations through officers of state or envoys, and then submits the treaty as agreed upon to the organ of the state having power of

³⁹"The so-called right of making treaties is not a right of a State in the technical meaning of the term, but a mere competence attaching to sovereignty." 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 543.

⁴⁰"It is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of the state." Vattel, *Chitty's Trans.* (1861) Book II § 154.

⁴¹United States of America.—The power is exercised by the President by and with the consent of the Senate. "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." Art. II. § 2, (2) Constitution of the United States. 5 Moore, *Dig. of Int. L.* (1906) pp. 156-221.

France.—By Art. 8 of the Constitution, "the President exercises the treaty-making power, but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament." 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 546.

Germany.—By Articles 1, 4, and 11 of the Constitution, the emperor exercises the treaty-making power; but such treaties as concern the frontier, commerce, and several other matters, are not valid without the assent of the Bundesrath and Reichstag. 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 546.

ratification. We have therefore to consider negotiation and ratification.

The terms of the treaty are arrived at by negotiation between the states concerned, which negotiations may be carried on by the head of the state directly, by other officers of the state appointed by law, or by diplomatic agents appointed for the purpose. Direct negotiation by the head of the state is usually impossible and rarely occurs in practice. The usual custom is to empower negotiators. The Secretary of State or Foreign Minister usually supervises the action of the negotiators and acts as an intermediary between the government and the diplomatic agents.

The agents for negotiation have the powers conferred by the state sending them, generally expressed in a written document. When the agents meet, the powers are exhibited, and sometimes a representative will refuse to go on with the negotiations if the powers conferred on the other party are not satisfactory.⁴²

It is obvious that the negotiation must result in an agreement between the parties, otherwise there can be no treaty in fact, and that the terms of the treaty consist of what was agreed upon by the negotiators. The treaty, therefore, is a written document so drawn up. The fact of agreement has caused great difficulty in international law. When two individuals stand face to face, the fact of agreement will be evidenced by writing signed, word, or otherwise. Even in the municipal law cases arise where there is a dispute over whether there was an agreement in fact. Now, when we turn our attention to international life, we find that the cumbersome immensity, compared with individuals, of the bodies with which we are dealing, has given rise to some difficulties of practice. The cases conveniently fall into the headings of absolute monarchs and constitutional states, either monarchical or republican. This is one of the cases where the form of state is material in international law, and another illustration of the change in international relations caused by the advent of democracy.

An absolute monarch was the state in theory and in fact, and his personal assent was all that was necessary to the completion

⁴²In the United States the negotiation is generally conducted by the Secretary of State. Indian treaties were negotiated by special commissioners acting for the President under the War Department until control of Indian affairs was transferred to the Department of State. These treaties were filed with the Department of State. No Indian treaties have been made since the Act of March 3, 1871, which forbade further recognition of Indian tribes or nations as independent powers. Postal Conventions, since the Act of June 8, 1872, are negotiated and made by the Postmaster General. As to negotiations by the United States see, 5 Moore, *Dig. of Int. L.* (1906) pp. 179-184.

of a treaty. In the rare cases where monarchs dealt with each other in person, the case would in fact be just like that of two individuals making a contract in municipal life.⁴³

In most cases the negotiations were carried on by agents or envoys who would act on behalf of their royal master in settling upon the terms of the treaty. Such proceedings were regarded as of the greatest moment, and were hedged around with an amount of etiquette which to our eyes seems ridiculous.

The practice was for the negotiators to draw up the treaty as agreed upon in their names as envoys, and to sign it as such. The treaty so executed was incomplete on its face until approved by their royal masters. This approval was called a ratification.⁴⁴

The necessity of a ratification as such arose from the form in which the document was cast. Had the treaty been expressed to be between the monarchs alone, then they would have executed the writing, and, by so doing, have ratified that which their agents had done, but not the treaty, which would have come into existence as a document only when so executed. The distance which generally separated the parties and consequent delays probably dictated the former practice which has continued to the present time.⁴⁵

⁴³1676. Charles II. personally transcribed, signed, and sealed with his own hand a secret treaty with Louis XIV. 3 Hill, History of Diplomacy 143. The Treaty of Cambrai (1529) between Francis I. of France and the Emperor Charles V., was called "*Paix des Dames*" from the circumstance that it was negotiated by Margaret of Austria, sister of Charles and Louise of Savoy, mother of Francis.

⁴⁴Ratification seems to have been usual in practice. "One of the earliest recorded examples of this practice was in the treaty of peace concluded, in 561, by the Roman Emperor Justinian with Cosroes I., King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and the ratifications formally exchanged. Barbeyrac, *Histoire des Anciens Traites*, Partie II. p. 295." Wheaton, *Elements*, Dana's ed. (1866) p. 333, *n. b.*

The Convention of July 15, 1840, between Austria, Great Britain, Russia, Prussia and Turkey, relating to the Ottoman Empire, provided that the preliminary engagements should take effect immediately without waiting for exchange of ratifications. Wheaton, *Elements*, Dana's ed. (1866) p. 337, cites this as a case where ratification was expressly dispensed with. Hall *Int. Law* 6 ed. (1909) p. 325, however, says that the envoys who signed the treaty, unless acting under a previous enabling agreement, had no authority to dispense with ratification, and that the treaty was properly a provisional one, which, when carried into effect, received tacit ratification by execution of its provisions.

⁴⁵"Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives". 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 553. As to the form of ratification, see, Hall *Int. Law*, 6 ed. (1909) p. 326. Ratification may be tacit or express. *Ibid*, p. 322. To say, as Oppenheim does (Vol. 1, 554), that the institution of ratification is a necessity for international law, is to overlook the question. What the Professor probably means is that ratification is a necessary precaution to be insisted upon by the municipal law of each state in order to avoid undue haste in making treaties.

The envoys were invested with full powers to negotiate and conclude a treaty out of consideration of the importance of the business, the high position of the parties, and respect to the other monarchs with whose agents they were engaged. It was always understood, nevertheless, notwithstanding the apparent amplitude of the instructions, that their acts were subject to ratification.⁴⁶ The prince was left somewhat at the mercy of his agents who might play him false or conclude a treaty not to his liking. Notwithstanding this, the opinion was sometimes advanced that he was bound by the acts of his agents, and that he was obliged to select them at his peril, a rule which was not without its practical advantages.⁴⁷

The idea was then advanced that where the ambassador had acted in compliance with his instructions, secret or public, the prince is bound to ratify, but where the ambassador has exceeded or violated his instructions, the prince may delay or refuse ratification.⁴⁸ Another opinion advanced was that full powers given to an agent, although absolute on their face, were subject to an understood qualification that the prince could refuse for sufficient reason to ratify the treaty agreed upon.⁴⁹

Another notion was that the treaty is binding except where the envoy has exceeded his full patent power, and ratification is only necessary in the case where it is expressly reserved in the full powers or stipulated in the treaty itself.⁵⁰ In this state of affairs, the prince was dethroned from his absolute power to conclude a treaty, and the voice of the people appeared in government to limit his power. The rise of democracy produced a change in the practice of ratification which will next be described.⁵¹

⁴⁶Wheaton, *Elements*, Dana's ed. (1866) p. 333.

⁴⁷Grotius, Puffendorff cited in Wheaton, *Elements*, Dana's ed. (1866) pp. 330, 331.

For a discussion in the 17th century over the question of whether a treaty should be regarded as being in force before being ratified by the Queen of Sweden, see Grotius, by Vreeland (1917), 195-197.

⁴⁸Bynkershoek quoted in Wheaton, *Elements*, Dana's ed. (1866) pp. 330, 331; Vattel, Chitty's Trans. (1861) Book II § 155.

⁴⁹"But, before a prince can honourably refuse to ratify a compact made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons, and, in particular, to prove that his minister has deviated from his instructions." Vattel, Chitty's Trans. (1861) Book II, § 156.

⁵⁰Kluber quoted in Wheaton, *Elements*, Dana's ed. (1866) p. 334.

⁵¹Hall, *Int. Law* 6 ed. (1909), pp. 323, 324, says that ratification by a state is necessary to the validity of the treaty, which ratification in strict law may always be withheld, but morally or legally cannot be arbitrarily withheld, but a state must be left to its own discretion, subject to restraints

When the power of the government is limited and the people have a voice in the government, it is absolutely out of the question for any agents appointed by an executive to bind the government or the state. The unlimited agents of the monarch are replaced by the limited agents of modern governments, the powers of which, however, are usually expressed to be exercised subject to ratification by the state sending them.⁵² Many writers still continue to discuss the question of when a ratification may be refused. Necessity of ratification is now apparent, as we would say at the bar, on the face of the record.⁵³

It is only necessary now to notice that if the treaty is ratified in part or with modifications, there is no agreement, and the negotiations must be renewed or, as it is clumsily expressed by the writers, a treaty cannot be ratified in part. This ratification may be made with reservations upon the understanding that terms shall be understood in a certain way. The time of ratification is usually fixed in the agreement of the negotiators, and each party given a certain time within which to ratify it, following which the treaty, as it is said, falls to the ground.⁵⁴

imposed by its own sense of honor and risk of wanton refusal, but that the above rule of moral obligation or ratification cannot be applied to a state like the United States, where ratification is required by the municipal law. Hershey, *Int. L.*, (1912) p. 315, says that while some maintain that a state is morally bound to ratify, he knows of none who maintains that it is legally bound.

⁵²"It is now the practice to make an express reservation of the right of ratification either in the full powers given the negotiators or in the treaty itself." Hall *Int. Law*, 6 ed. (1909) p. 325.

⁵³Agents for ratification by municipal law: United States of America—The United States Senate, see 1 Willoughby, *Constitutional Law*, 462, *n.* 14, and for note on United States practice, see Dana's *Wheaton* 338, *n.* 138; see also 5 Moore, *Dig. of Int. L.* (1906) pp. 184-310.

The Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain as Emperor of India. The Governor General of Turkestan has similar powers for the Emperor of Russia. 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 558. "* * * in England the sovereign can make a treaty without consulting parliament, as of necessity, though it is customary to acquaint parliament with the fact of such negotiation having been completed, and in some cases—especially if money be needed to carry it into effect—the treaty is laid on the tables of the two Houses before it is ratified." Manning, *Int. L.*, 2 ed. Amos (1875) p. 128; see, 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 79, *n.* s.

⁵⁴The commercial treaty of Utrecht between Great Britain and France was never carried into effect as the British Parliament refused to pass the necessary legislation. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 299.

France refused to appropriate money to carry into effect the convention with the United States of America of 1831. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 300.

In 1841, the French Government refused in consequence of the opposition of the Chambers to ratify a treaty made for the suppression of the slave trade. Hall *Int. Law*, 6 ed. (1909) p. 324.

The United States Senate ratified with modifications the treaty made

A distinction has been drawn with respect to ratification, in that it has been supposed that there is no necessity for ratification unless it is expressly reserved in the case of cartels, truces, capitulations and the like, since they are concluded in the exercise of a general implied power confided to certain public agents as incidental to their official duties.⁵⁵ This distinction, it is believed, is unsound because in any such case the state may disavow the action of the agent, and no doubt in any such case the agreement made by him is submitted to some kind of examination and approval at headquarters. The fact is that such agreements are rarely interfered with, as the circumstances are so obvious, and ordinarily the officer will be in receipt of some instructions covering the matter before he makes the agreement.⁵⁶

THE OBLIGATION OF A TREATY.

In the municipal law, a contract which conforms to requisites prescribed by that law is binding on the parties, and if one fails to perform, the other may have the assistance of the political power of the state to secure redress for the damages caused by such failure of performance. That is all there is to the binding effect of a contract. In the international world there is no political power which can afford such redress for the breach of the terms of a treaty. The question, therefore, has been greatly discussed among the writers as to the binding effect of a treaty, that is, how far there is an obligation on a state to perform a treaty.

The practice and notions concerning the obligations of a treaty have been considerably modified by the rise of democracies and the growth of limitations on the power of the monarch. The absolute

with Great Britain in 1824 with respect to the mutual right of search. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 301.

The Hay-Pauncefote Treaty of February 5, 1900, was ratified with modifications by the United States Senate on December 20, 1900, by which the treaty fell to the ground, Great Britain refusing to accept the modifications. 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 557. Hall *Int. Law* 6 ed. (1909) p. 326, *n.* 2, says that such a case is not a ratification but a new treaty. The word "ratification" is a misnomer under which refusal of ratification is disguised. The distinction is immaterial.

⁵⁵Wheaton, *Elements*, Dana's ed. (1866) p. 329.

⁵⁶Confirmation of treaties.—It has been the practice in the international world for states when entering into treaties to confirm earlier treaties. This was particularly resorted to in the days when kings were on the thrones of Europe and treaties confirmed the various territorial positions and pretensions of the reigning houses which were constantly upset by turmoil of the powers. Every prince, therefore, who had any advantage sought to have that confirmed by each succeeding treaty entered into by the other parties.

monarch was the state, and a treaty entered into by him was his personal promise, and as such was hardly worth the paper it was written upon. It was obvious that the mere word of the prince was not to be trusted, and various means were resorted to in the attempt to add to the obligation of the treaty, namely, oaths,⁵⁷ hostages,⁵⁸ pledges, guarantees—(a) consisting of offering persons as sureties, (b) choosing third powers as guarantors of the treaty,⁵⁹—and military occupation of territory.⁶⁰

The Pope frequently assumed the power of absolving a king from his treaty engagements.⁶¹

Notwithstanding the fraud and deceit which prevailed in international relations, there was a strong opinion⁶² in favor of the

⁵⁷Thus, it was customary to add to the solemnity of a treaty by taking an oath over the bones of the saints, the gospels, wood of the true cross, the Host, and the like; or the parties frequently submitted themselves to the jurisdiction and censure of the Church. They apparently were greatly concerned lest the Pope should absolve one of them from his oath. See Mountague Bernard, *The Obligation of Treaties* (1868), quoted in Manning, *Int. L.*, 2 ed. Amos. (1875) p. 125, for examples of the language used in treaties to give them a binding effect.

The following treaties were confirmed by oath:

1526, Treaty of Madrid between Francis I. and the Emperor Charles V.

1529, Peace of Cambrai.

1559, Peace of Chateau Cambresis.

1559, Peace of the Pyrenees.

1648, Peace of Münster, between Spain and the revolting Dutch colonies.

1668, Peace of Aix-la-Chapelle between France and Spain.

1697, Peace of Ryswick.

Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 81. The last case of a treaty secured by oaths was that of the alliance between France and Switzerland in 1777. 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 566; 1 Halleck, *Int. L.*, 4 ed. (1908) p. 309.

⁵⁸The last case of hostages was that of the Peace of Aix-la-Chapelle in 1748, by which hostages were stipulated to be sent by Great Britain to France for the purpose of securing the restitution of Cape Breton Island to France. Two hostages were sent and remained in France until July, 1749. See Hall *Int. Law* 6 ed. (1909) p. 339; 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 566; Wheaton, *Elements*, Dana's ed. (1866) p. 365.

⁵⁹2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 81.

⁶⁰1871—Preliminary Peace Treaty of Versailles between France and Germany at the conclusion of the Franco-German War, provided that Germany should retain military occupation of certain parts of France until the final payment of the war indemnity which was imposed upon France. The German troops remained in possession until the amount due was paid. 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 567; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 83.

⁶¹In the following cases the Pope absolved the parties from the obligation of a treaty: Ferdinand, called "The Catholic", was released by Pope Julius II.; Francis I. by Leo II. and Clement VII.; Henry II. of France by the Papal Legate Caraffa. 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 82. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 310, contends, not without great force, that the conduct of the Pope is not to be judged by modern standards and conditions.

⁶²1747—"Glory be to God * * * who, among other things has rooted out all hatred and enmity from the bosoms of these nations, and has com-

notion that treaties should be observed, and there were a number of shining examples of such observance which stand forth in the dark history of medieval Europe. In recent times, this opinion has grown stronger, and the principle of the obligation of treaties is now universally assented to by all states, although sometimes violated in practice,⁶³ and is supported by the unanimous opinion of the text writers.⁶⁴

With the rise of democracy and the growth of constitutional limitations on the power of the king, the idea of the state, as being embodied in the person of the king, disappeared. A state is now regarded more nearly as a corporation, a public body, and at least is not regarded as the personal property of any individual or as representing the personal faith or honor of any individual. An oath, therefore, is entirely inappropriate in the execution of

manded them to *keep their Treaties inviolable*, as the ever glorious book sayeth, *O ye who believe, keep your covenants*". Preamble to Treaty between Nadir Shah, Emperor of Persia, and Sultan Mahmoud, Emperor of the Turks. Quoted in 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 70.

1870—During the Franco-German war, Russia declared her withdrawal from such stipulations of the Treaty of Paris of 1856 as concerned the neutralization of the Black Sea and the restriction imposed upon Russia in regard to men-of-war in that sea. Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory powers of the Treaty of Paris, namely, Austria, Great Britain, France, Germany, Italy, Russia and Turkey, complied with the wishes of Russia and abolished the neutralization of the Black Sea, it adopted in a protocol of January 17, 1871, the following declaration: "It is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement." 1 Oppenheim, Int. L., 2 ed. (1912), pp. 575, 207, n. 1; 2 Phillimore, Int. L., 3 ed. (1879-1888) pp. 76, 77.

⁶³1886—Russia notified her withdrawal from Article 59 of the Treaty of Berlin of 1878, stipulating the freedom of the port of Batoum, to which the other powers seemed to have consented, Great Britain protesting. 1 Oppenheim, Int. L., 2 ed. (1912), p. 575.

1908—October—Austria-Hungary, in violation of Art. 25 of the Treaty of Berlin of 1878, proclaimed her sovereignty over Bosnia and Herzegovina. 1 Oppenheim, Int. L., 2 ed. (1912) pp. 575-576.

1908—Bulgaria, in violation of Art. 1 of the Treaty of 1878, declared herself independent. 1 Oppenheim, Int. L., 2 ed. (1912) p. 575.

1914—Germany violated the provisions of the treaties guaranteeing the neutrality of Belgium and Luxemburg, to which she was a party, by making military use of the territories of these countries in the campaign against France, which opened the Great War of 1914.

⁶⁴Manning, Int. L., 2 ed. Amos. (1875) p. 123, instances the multitude of subsisting treaties as a remarkable tribute to the practical force which is attributed to the good faith of states. Vattel, Chitty's Trans. (1861) Book II, § 163, says that the obligation of observing treaties is imposed by the natural law, and that the reproach of perfidy is esteemed by sovereigns a most atrocious affront. See 1 Phillimore, Int. L., 3 ed. (1879-1888) pp. 69, 70.

treaties between such bodies; even in a constitutional monarchy the personal aspect of the king has disappeared in the larger aspect of the state. The Holy See has ceased to absolve the obligation of treaties and the result in modern times is strongly in favor of the increased force of treaties.⁶⁵

It is now important to consider in what respect treaties are binding. A contract is binding in municipal law because of (a) the attitude of the party who considers himself bound in honor, (b) the judicial remedy afforded by the political power of the state in case of a breach, (c) the fear of public condemnation visited because of failure to keep the contract, and the disastrous personal effect of the failure to perform one's undertakings, (d) pressure from the other party to the contract in the shape of reprisals and perhaps a refusal to have further dealings.

In other words, men are honest because of inborn instinct, because they are forced to be honest, or because it pays to be honest. The self-interest of an individual, therefore, which will frequently impel him to break a contract is restrained by the factors mentioned.

All these factors are present in international life except that of judicial remedy, and there is here the additional factor of force which is usually absent or negligible in individual affairs. A state, therefore, will be impelled to observe a treaty by (a) self-interest. This is usually present. Treaties are framed with more care than is usually exercised by the individuals in making contracts, and they commonly represent the best possible adjustment at the time of the conflicting self-interest of the parties. (b) International public opinion. The force of international public opinion impelling an observation of treaties is not to be despised or overlooked. Germany, in 1914, violated her treaty obligations with respect to the neutrality of Belgium, at first with insolent contempt. When, however, she felt the force of international public condemnation, she immediately began to invent excuses for the violation, asserting that France had violated the treaty first, and, therefore, she was excused in doing what she did. This public opinion is gaining strength every day with the increased diffusion of education among the masses. (c) Pressure from other states.⁶⁶ This

⁶⁵It is to be understood that these remarks do not apply to the few autocracies, such as Germany and Austria-Hungary, etc., which still remain.

⁶⁶Instances of treaties enforced by direct pressure of one contracting party against the other:

1840—Case of Sulphur Monopoly in the Kingdom of the Two Sicily. By treaty concluded in 1816 between Great Britain and the Kingdom of the

pressure may be exercised by diplomatic suasion, threat of or the use of force, and may be applied by the other party or parties to the treaty or by third states not parties. The other state may also resort to reprisals, and thus enforce compliance.

There is also an element of necessity. It is necessary for independent states in their conduct with each other to be able to entertain a reasonable well-founded expectation that other states will observe their written obligations.⁶⁷

A state is the only party to a treaty, and if the treaty has any

Two Sicilys, certain commercial advantages were secured to citizens of Great Britain, and the Neapolitan Government stipulated that no mercantile privileges disadvantageous to such interests should be granted to any other state. In 1847, the Kingdom of Naples granted a monopoly of all the sulphur worked and produced in Sicily to a company of private individuals, nationalists of different countries. In consequence of the refusal of the King of Sicily to rescind the grant of the monopoly, the English fleet commenced hostilities in the vicinity of Naples, whereupon the Neapolitan government gave way. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 115; 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) pp. 35-37.

1840—Great Britain and Portugal. Portugal compelled to sign a convention for payment of certain claims of British Legion and British auxiliary force in Portugal. The account is obscure. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 115.

The United States Congress, by resolution of July 7, 1798, declared that treaties with France were no longer obligatory on the United States, as they had been repeatedly violated by the French Government and all just claim for reparation refused. The French Government refused to admit the abrogation of the treaties. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 347; 5 Moore, *Dig. of Int. L.* (1906) p. 356.

Action of United States in enforcing treaty of July 4, 1831, for settlement of spoliation claims against France. See 7 Moore *Dig. of Int. L.* (1906) p. 123 *et seq.* Vattel, *Chitty's Trans.* (1861) Book II §§ 221, 222, advances the opinion that where a nation has violated a treaty, other nations are justified in forming a confederacy to punish the violating nation. This opinion has been criticised by subsequent writers, for example, Halleck, who says, 1 Halleck, *Int. L.*, 4 ed. (1908) p. 308, that Vattel is not sustained by later authorities. The events of the Great War of 1914, however, where Germany brought down upon herself the coalition of nearly all the great powers of the world, largely because of her violation of the terms of a treaty, seem to lend great weight to Vattel's opinion.

"Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, pp. 542-543, advances the following views on the binding force of treaties. He says the question can be satisfactorily dealt with by only answering several questions, which he propounds and answers as follows:

(1) Why are treaties legally binding? To which he answers—that they are so because of a customary rule of the law of nations. The answer, however, begs the question, which is whether there is a rule of international law which makes them binding. Unless there is such a law, they cannot be binding, and even if such a law exists, there is the further question of the binding effect because of the impotency of that law, which, as we have seen, is in a condition of self-help.

(2) What is the cause of the existence of such a customary rule? To which he answers that the rule is required by religious and moral reasons, as well as the interest of states, that there can be no law between nations in the absence of such a rule, to which he adds: "All causes which have been and are still working to create and maintain an International Law are at the background of this question." The answer to the second question clearly shows that the learned professor is simply saying that there

obligation at all, it is obligatory only on the state in its corporate capacity. Individuals within the state are affected only by the municipal law imposing on them an obligation conforming to the superior obligation resting upon the state. This command of the municipal law may appear either in an act of the legislature or in a decree of the court. A failure of the state to make the municipal law conform to the obligation of the treaty is simply a failure to carry out the terms of the treaty. So also where the powers of the government are divided by a constitution into executive, judicial and legislative, and the treaty-making power is vested, as is generally the case, in whole or in part in the executive, the legislative branch may refuse to pass the necessary legislation to carry out the treaty.⁶⁸ Such a refusal may be grounded on some objection to the treaty or may proceed merely from jealousy.

are quite good reasons why treaties should be binding, which statement no one will deny. Which, however, is not the same thing as a statement that they are in fact binding by law. The statement that international law cannot exist unless treaties are binding simply begs the question, which is whether they are binding by international law. To say, furthermore, that certain causes are at the background of a question is hardly a statement of sufficient precision in a treatise on a subject of such scientific difficulty as international law.

(3) How is it possible to speak of a treaty as legally binding in the absence of judicial authority to enforce it? To which he answers that although there is a legal binding force to treaties, it is not the same as the binding force of contracts in municipal law, because international law is a weaker law than municipal law, and therefore less enforceable. But as international law does not lack legal character because of absence of judicial authority, so treaties have legally binding force even though there is no judicial authority to enforce them. Upon this it is to be observed that there is no question but that the absence of judicial redress in international law differentiates it from municipal law. To state that proposition, however, does not answer the question. When he says that international law does not lack legal character, he refers to § 5 of his book, which has already been discussed, and assumes that international law is law of some kind, but leaves entirely open the question whether he assumes it is law with a judicial right of redress, or law with only a right of self-help. If we grant his proposition, that international law is law in the sense that municipal law is, then it follows from the definition that treaties are legally binding. If, however, we disregard this assumption, the question remains open to further inquiry.

Martens (quoted in 1 Halleck, *Int. L.*, 4 ed. (1908) p. 301) says the following elements are necessary to make a treaty binding: (1) that the parties have power to contract, (2) that they have consented, (3) that they have consented freely, (4) that their consent is mutual, (5) that the execution is possible. This, however, introduces too many conceptions of the municipal law, and does not cover the subject even from that point of view.

For a discussion of the binding effect of treaties, see Hall *Int. Law*, 6 ed. (1900) p. 318 *et seq.*; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) pp. 69, 70.

⁶⁸Thus, the provisions of the commercial treaty of Utrecht between France and Great Britain, by which the treaty between the two countries was to be placed on the footing of reciprocity, was never carried into effect, the British Parliament having rejected the bill brought in to change the municipal law. Wheaton, *Elements*, Dana's ed. (1866) p. 339.

EXCUSE FOR NON-PERFORMANCE.

There are two questions, as in municipal law, which, however, are not clearly distinguished by the international law writers. The first is—is the treaty binding? The second is, assuming that it is—are there any excuses for its violation which may be recognized?

Since there is no political power superior to the independent states of the world to pass on the validity of any excuse, the question can only be resolved by the operation of the forces impelling the observance of the treaties already referred to.

If the contract is binding in municipal law, that is, has been properly formed, then there is no escape from its obligation except by some legally recognized excuse. If it is not binding, then the question of excuse is not reached, but the party may set up a refusal to be bound at all because there never was any valid contract. The escape from the obligation of the contract must be considered from one point of view or the other, and both cannot be entertained at the same time, although the writers have frequently made the attempt.

It is to be observed, in the first place, that an executed treaty cannot be said to have any binding effect because it has been performed, and there is nothing left for either of the parties to do. There is no room, therefore, to impose any obligation under it. It has been supposed, however, that there is an obligation of some sort surviving the performance of the treaty.

Thus, if a treaty of cession is made and carried out, as, for instance, the treaty between the United States and Denmark, relative to the transfer of the Virgin Islands, the territory ceded becomes a part of the other state. In the case put, the Virgin Islands are now part of the territory of the United States of America. The notion in question, however, appears to go to the point of maintaining that Denmark is under a duty or obligation arising out of the treaty to refrain from interfering with the United States' exercise of jurisdiction over these islands. It is no more competent for Denmark to undertake to retake possession of those islands than it would be for Denmark to undertake such an act with respect to Massachusetts, Virginia or Texas. The United States must maintain the integrity of its territories by force, and if it is not able to do that, no principle of any kind can save it. Why, therefore, invent a fanciful conception of contract obligation

surviving the full performance of a treaty to account for conduct which can as well be explained by the facts of international life⁷⁰

It has often been said that a treaty is not binding which is in violation of international law or contrary to morals. This is a mere opinion of the writers. Since there is no tribunal in existence over the states to determine the question, we must assume that every obligation between two states is equal in all respects in validity to every other obligation. So, also, the statements in the books that immoral treaties are void, and that a treaty cannot provide for the doing of an act by a third party, are merely academic.⁷¹

Suppose a treaty is made by the officers of the state beyond the powers conferred upon them by the municipal constitution. This would present a case of an *ultra vires* treaty. Of course, when there is no such limitation by the municipal law, and the monarch exercises the sovereign power, there can be no question of an *ultra vires* act because his power is co-extensive with every act which he can perform.

It has been suggested that a treaty ruinous to a state or destroying the national organization is beyond the power of the head of the state, and that such a treaty would be illegal or null and void. What is meant is, that the people as a body would refuse to perform such a treaty and require the head of the state to go back on his word, and the question whether such action would be successful will be determined in the last analysis by force, that is, whether the state is powerful enough to maintain its position.⁷²

⁷⁰1 Oppenheim, Int. L., 2 ed. (1912) p. 570, says that the performance of a treaty does not terminate its binding force, and it is as valid as before, although now of historical interest only. It is difficult, however, to perceive what is the binding force of a treaty which neither party is obligated to perform. The learned professor probably has in mind the fact that the altered state of facts brought about by the performance of such a treaty continue in existence by virtue of such performance.

⁷¹Hall Int. Law 6 ed. (1909) p. 320, cites as examples—a treaty which has for its object the subjugation or partition of a country, or a treaty for the assertion of proprietary rights over the open ocean, or a compact for the re-establishment of the slave trade.

A treaty cannot obtain (a) engagements inconsistent with those already entered into with other states; (b) an engagement to do or to allow that which is contrary to morality and justice; (c) it may be invalid upon the ground of physical impossibility existing at the time or supervening from later circumstances. 2 Phillimore, Int. L., 3d ed. (1879-1888) pp. 78, 79.

Vattel, Chitty's Trans. (1861) Book II § 161, says that a treaty concluded for an unjust or dishonorable purpose is absolutely null and void for want of sufficient powers, nobody having a right to engage to do things contrary to the law of nature, and instances an oppressive alliance for the purpose of plundering a nation.

Hall Int. Law 6 ed. (1909) pp. 338, 339, says that third states are not bound to observe a treaty between other states contrary to law.

⁷²After the return of Francis I. of France from captivity at the hands

A treaty may become burdensome to the best interests of the state, and it may turn out that the performance of its terms will be of serious damage to the interests of the people of the country. Is there any ground to escape the obligation of the treaty, assuming that such an obligation exists? There is, as we have seen, no power superior to the state to determine whether the performance of the treaty is in fact prejudicial, and every state will be guided by its own discretion and self-interest, subject to the external compulsions of international public opinion and pressure from other states. The practical question in each case will be—which is the stronger—self-interest or external compulsion? The Germans, in 1914, concluded that self-interest was stronger and violated the neutrality of Belgium in defiance of international public opinion and external pressure from other states.

It is useless to attempt the statement of rules applicable to such a case. The plain long and short of it is that every state will disregard a treaty which it considers ruinous whenever it feels strong enough to do so.⁷²

It is generally stated by the writers that a change in circum-

of Emperor Charles V., some of the principal people of France declared that the treaty of Madrid, forced from Francis by Charles, was void as contrary to the laws which in express terms prohibited the king from dismembering the kingdom without the concurrence of the nation. Vattel, Chitty's Trans. (1861) Book I, § 265.

In 1506, the States General of France assembled at Tours, engaged Louis XII. to break the treaty which he had concluded with the Emperor Maximilian and the Archduke Philip (his son) because the treaty was pernicious to the kingdom. Vattel, Chitty's Trans. (1861) Book II, § 160.

Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, p. 295, under the heading "The Obsolescence of Treaties", appears to discuss certain cases where one of the parties may consider itself as no longer bound. Obsolete means gone out of use, and obsolescence means the going out of use. The query arises—how is it proper to speak of a treaty which is void or as to which there is an excuse for its non-performance, as going out of use? He discusses under this heading the case of a party refusing to be bound because of a change of circumstances.

⁷²The opinion has been advanced that a state may disregard a ruinous treaty. Vattel, Chitty's Trans. (1861) Book II, §§ 157-160, says that a treaty is valid if properly entered into and may not be disregarded for mere injury; it is null and void when it would lead to the ruin of a nation because such a treaty is beyond the powers of the conductor of the state, since a state being under an obligation to preserve itself may not enter into engagements contrary to its indispensable obligations.

Manning, *Int. L.*, 2 ed. Amos (1875) p. 73, says that an understanding actually exists among the powers of Europe to the effect that no delegate is supposed to have power to compromise a nation's vital prosperity, independence or permanent happiness, and that no nation is expected to fulfill a treaty at any enormous sacrifice to its happiness. He instances under the latter head a treaty of mutual succor, and says that one of the states would not be expected to detail forces to aid the other when subject itself to an invasion, the repelling of which would require all its resources. He instances the States General of France, that in 1506, at Tours, engaged

stances will sometimes justify a state in refusing further performance of a treaty or that every treaty is entered into under an implied condition that the circumstances existing at the time will continue, and that therefore a change in those circumstances will constitute a breach of the condition and effect a release from the obligation of the treaty. The first question is—what change in circumstances will have such an effect? Upon this there is no agreement. Vital, essential, are the terms used, or it is said that the party entitled to disregard the treaty is only to act under a grave sense of moral responsibility. Such looseness of thought is open to serious objection, and entirely removes the principle from any possible accurate practical application. The doctrine of implied condition is purely judge-made, evolved to promote the doing of justice in affording redress on a contract. It seems to have no place, therefore, in the political anarchy of the international world, and the doctrine is too refined for the rough jostling of independent states.

It is perfectly obvious that in international affairs cases will frequently arise where a change of circumstances will put an entirely different aspect on the obligation of a treaty and bring the self-interest of a state in direct opposition to further performance. Many of these cases will be so clear that all reasonable men will be in agreement. As to others, there will be a doubt which can only be adjusted by the action of the states concerned, in which action there is no external factor of restraint except those existing in the international world, to which we have already alluded.

Contracts between individuals rarely extend over any considerable period of time, and those exceeding the duration of a human life exist only in the case of leases, which refer to a permanent object, as property. Most independent states are several centuries old and some of them can look back on a thousand years of state life. It is obvious, therefore, that treaties entered into

Louis XII. to break the treaty he had concluded with the Emperor Maximilian.

Hall, *Int. Law* 6 ed. (1909) p. 342, says that the doctrines laid down by the writers are of such perilous looseness that under them an unscrupulous state need never be in want of a plausible excuse for repudiating an inconvenient obligation. This remark shows how far the writers are removed from the actual facts of life. It is a common saying at the bar that no contract can be written through which an astute and unscrupulous lawyer cannot drive a coach and four. If this is true, as it very largely is in municipal law, what can be said of the obligation of a treaty in international affairs where there is no political power to enforce it. The perilous looseness is not in the doctrine of the writers but in the structure of the international community.

between such bodies as these will, in the course of time, be more frequently complicated by a change in circumstances than will the contracts of shorter duration in time entered into by individuals.⁷³

It has also been contended that a treaty is void when it is impossible of performance. In such a case the treaty will necessarily be broken because the party cannot perform. The case usually cited is that where three states contract a treaty of alliance, and two of them subsequently engage in war, the third state obviously cannot be an ally of both. Some writers would perhaps take the ground that in such a case there was an implied condition that none of the parties to the treaty would fight with each other; or it may be supposed that a treaty of alliance necessarily precludes the idea of hostilities between two of the parties, and therefore those two, by engaging in war, break the treaty and free the third state from any obligation of performance. Whatever view may be taken of this particular case, it seems clear that since there is no way of obtaining redress for failure to perform a treaty except by the external factors of compulsion on state conduct already alluded to, that in the case where a state finds it impossible to perform a treaty, there will ordinarily be no redress. Even in municipal law, the redress in such case would extend merely to compensation by way of damages and never to specific performance. Among independent states damages for breach of a treaty are almost unknown, and what each state requires, if it requires anything under a treaty, is full and specific performance by the other party.

In municipal law there are cases where the individual may

⁷³Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, pp. 574, 575, says: "And the States and public opinion everywhere have come to the conviction that the clause *rebus sic stantibus* ought not to give the right to a State at once to liberate itself from the obligations of a treaty, but only the claim to be released from these obligations by the other parties to the treaty."

* * * "For it is an almost universally recognized fact that vital changes of circumstances may be of such a kind as to justify a party in modifying an unnotifiable treaty * * * that all treaties are concluded under the tacit condition *rebus sic stantibus*." pp. 572, 573.

Hall, *Int. Law*, 6 ed. (1909) p. 342, says: "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory forces at the time of its conclusion is essentially altered." Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, p. 296, quoting this passage, seems to think it is not a clear principle, although so designated by Hall, and says that the question only arises when there is a difference as to what conditions were implied or were admitted; that the right of denouncing a treaty is an imperfect one, not to be condemned *in toto*, but only to be exercised on a grave sense of moral responsibility. For change in conditions, see 5 Moore, *Dig. of Int. L.* (1906) pp. 335-341.

obtain relief from the obligation of a contract which has been imposed upon him by duress. This relief is administered by the political power of the state acting through its appropriate agents. In the international world, there is no political power superior to the independent state, and therefore there is no judicial remedy for relief from the obligation of a treaty which has been imposed upon a state by force. Force rules the international world, and that which is accomplished by force and remains in continuance by force is the fact of that world. This is a matter of some difficulty as it is not easy at first for the student to perceive why the familiar principle which applies in municipal law does not apply to the relations of independent political communities.⁷⁴

So also where one state violates a treaty another state may be prevented by the former from interposing successful opposition to the breach.⁷⁵ The partition of Poland was probably not so much a violation of a treaty, although some of the parties to the plunder may have broken special treaties, as it was a forcible destruction of the state by powerful neighbors.⁷⁶

⁷⁴Force also rules in municipal life to a greater extent than the closest philosophers are aware.

⁷⁵Thus Belgium and Luxemburg, in 1914, were too weak to prevent Germany from forcibly violating her treaty obligations with respect to their respective neutrality.

⁷⁶"In international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement. * * * Consent therefore is conceived to be freely given * * * so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts." Hall Int. Law 6 ed. (1909) p. 319, quoted in Hershey, Int. L., (1912) p. 313. That is, the forced consent is a free consent if the amount exacted is no more than somebody supposes the state would freely give if it were willing, which obviously is an identical position and completely begs the question. "By means of a legal fiction, the sovereign defeated in war is also supposed to have freely consented to * * * (the terms) * * * imposed upon him by a treaty of peace." Hershey, Int. L., [1912] p. 101, n. 6. Why is there a legal fiction, and why confine it to defeat in war? A state may yield to overwhelming force without going to war.

Wheaton, Elements, Dana's ed. (1866) p. 340, says that generally a contract obtained by violence is void by municipal law, which principle promotes the welfare of society; otherwise the timid would be constantly forced into a surrender of their just rights. That, on the other hand, the welfare of society requires that engagements entered into by a nation under such duress as is implied by military defeat should be held binding, otherwise wars could only be terminated by the utter subjugation and ruin of the weaker party. It is submitted that this somewhat overlooks the true principle involved. Since in municipal affairs the political power of the state curbs violence between individuals, it necessarily follows that violence in obtaining a contract is to be curbed, and the only way to curb that is to permit the other party to escape the obligation upon proving the violence. In the case of international affairs, there is no political

There is a slight distinction to be drawn in this connection as a matter of historical interest. When the monarch was the state, it sometimes happened that he was the victim of duress, that is, the pressure was brought to bear upon him personally. Sometimes kings would be captured by their enemies, and while in captivity would be compelled to sign treaties. The opinion, therefore, was strongly entertained that duress of this kind was personal duress, and if the party who had been subject to it afterwards regained his freedom and was able to do so, he might disregard the treaty which had been wrung from him by compulsion.⁷⁷

It has been said ⁷⁸ that the surrender of the Spanish Crown

power superior to the independent states, and therefore no way to curb violence between them; consequently, a defeated state or one overcome by superior pressure cannot obtain any assistance and cannot thereafter, unless by its own force, escape from the fulfillment of the treaty which it was forced to make. Hence the treaty must be observed, not because of any principle of international law, but because of the stern facts of the case.

Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, p. 547, says, "A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the parties so represented." But this assumes that a treaty not so concluded is binding, as to which there is a doubt. No case has arisen where a state has, after ratifying a treaty, set up the insanity or intoxication of any of its envoys as an excuse for non-performance. Cases have arisen where before ratification a state has refused to go on, on the ground that the terms were exacted from its envoy under such circumstances.

Oppenheim, *Ibid.*, says, "It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of the party consenting to the terms of a treaty." This is remote from the point involved. The action of the forced state is not voluntary, and no sophistry can make it so. The municipal law confers a remedy in such case upon the assumption that it was not voluntary. The absence of remedy in the international world is not to be placed upon the obvious fiction that the act is voluntary, from which it would follow that if it were involuntary there would be a remedy, which is not the case, but upon the obvious fact that although the act is involuntary, there is no remedy for the state forced.

⁷⁷Instances of treaties made under compulsion by capture: 1111—Pope Paschal II. when prisoner by Emperor Henry V.; 1356—John of France, when prisoner of Edward III. of England at Poitiers; 1525—Francis I. of France at Pavia by Emperor Charles V. Woolsey, *Int. L.*, 5 ed. (1878) p. 169. Pope Clement VII. refused to ratify a treaty he had made with the Duke of Ferrara while he was a prisoner. 1 Halleck, *Int. L.*, 4 ed. (1908) p. 331.

Principal persons in France assembled at Cognac after the return of Francis I. from captivity at the hands of Emperor Charles V., declared that the treaty of Madrid which he had been forced to enter into by Charles, was void and that the latter ought not to have released his prisoner before the States General had approved. Vattel, *Chitty's Trans.* (1861) Book 1, § 265; 1 Halleck, *Int. L.*, 4 ed. (1908) pp. 329, 331.

In 1811, the Cortez of Spain passed a decree that no engagement should be valid which might be made by Ferdinand during his captivity.

⁷⁸2 Phillimore, *Int. L.*, 3 ed (1879-1888) p. 76.

under compulsion of Napoleon by Charles IV. and his son, Ferdinand VII., at Bayonne, in 1807, is an instance of the application of duress, which invalidated the surrender and justified the subsequent disregard of it. The subsequent setting aside of the surrender of the crown was only possible because of the overthrow of Napoleon. It was not that the Spanish people were legally entitled to undo the transaction but that subsequent circumstances made it possible for them to do so. If Napoleon had returned from St. Helena and had been able to seize and maintain his former power, the action of the Spanish people would doubtless have been undone. There is no distinction, therefore, between the resignation of Napoleon at Fontainebleau and the surrender by Ferdinand VII. at Bayonne, except that in the first case the surrender has remained an accomplished fact in the international world, whereas, in the second case, the party surrendering was able in fact to re-acquire the crown surrendered.

In the case of a republic or a limited monarchy, there can be no personal duress such as was applied to kings because the treaty can only be made by the constitutional authorities of the state, and it does not seem possible in any of these cases that such pressure could be applied outside the state jurisdiction. Of course, where the state was the property of the king, this jurisdiction resided wherever the king traveled. The only duress, therefore, which can be applied to the case of these modern governments is the case of overwhelming force, threatened or applied, as in the case of a defeat in war.

Where agents are sent to negotiate a treaty, they may be subject to some form of compulsion, and if that is discovered by the state which sent them before the treaty has been ratified there seems to be no reason in principle or justice why the ratification should not be refused, and such seems to be the general opinion.⁷⁹

It has sometimes been said that treaties cannot be made contrary to those already in existence. This is an academic statement because of course the inconsistent treaty can be made; the question is as to the effect of the second treaty on the first.⁸⁰

⁷⁹The duress of agents invalidates a treaty. A state may, of course, hold itself justified by political necessity in shaking off such an obligation (treaty enforced), but this does not alter the fact that such action is a breach of law. 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 547. Why justifiable if a breach of law?

⁸⁰For inconsistent treaty policy of countries in which different conduct has been observed in dealing with different countries, see, Hall *Int. Law*, 6 ed. (1909) pp. 10, 11.

"A sovereign already bound by a treaty cannot enter into others con-

EFFECT OF WAR ON TREATIES.

The effect of war upon treaties between the belligerents will vary according to the nature of the treaty. When the treaty is executed on both sides, as a boundary treaty or cession, the war will obviously have no effect because it is *functus officio*. The war may result in a change of the facts resulting from the performance of the treaty, as a change in the boundary. In such case, however, it is not the treaty which is affected but the state of facts resulting from the performance of the treaty.

If the treaty is made purely for the event of hostilities, it may or may not be observed by the belligerent parties. This is entirely a matter in their discretion, and it frequently happens that warring powers will disregard treaties which they find are not to their advantage in carrying on the hostilities.

If the treaty calls for continuous or future performance on each side of some matter unconnected with the war, as a treaty of extradition, the performance of the treaty will obviously be interrupted and may or may not be renewed after the termination of hostilities. The question of such renewal will be entirely within the discretion of the warring parties. It may be provided for in the treaty of peace which concludes the hostilities, or it may not.

As the circumstances which give rise to the treaties will obviously recur at the termination of the war, the states will generally continue the performance unless there is some special reason to the contrary arising out of the war.

A war may, of course, be undertaken as a result of a particular treaty, where there is a refusal to perform it coupled with an insistence on its performance by the other side. When the war is over, the parties will, in the treaty they make, confirm old treaties or not, as they see fit, and obviously while the war is going on, each side will observe such treaties as it thinks necessary. The continuance of any treaty between the belligerents during the war is a mere matter of mutual consent, as is also the revival, abrogation or continuance of such a treaty after the war. Where, however, the

trary to the first. The things respecting which he has entered into, engagements, are no longer at his disposal." Vattel, Chitty's Trans. (1861) Book II, § 165.

Thus, the provision of the Declaration of Paris of 1856, abolishing privateering, *ipso facto* abrogated all provisions of existing treaties providing for privateering made between the parties to the declaration. 1 Oppenheim, Int. L., 2 ed. (1912) p. 578. See, however, *n.* 1 on same page. For instances see, 5 Moore, Dig. of Int. L. (1906) pp. 363 *et seq.* 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 126, discusses the subject under heading of collision of treaties.

belligerents are parties to a general treaty, to which other independent states are parties, then no two of them can, except by force, set the treaty aside or escape from its provisions by a controversy between themselves without the consent of the other parties.

It is believed that this is all there is to be said upon the subject. The writers have attempted to lay down a number of rules which seem rather academic and hardly applicable to the hard facts of life. Since there is no political power superior to the independent states to enforce a treaty in time of peace, it is obvious that in time of war, when external restraints on the action of states are of less effect, that treaties will be the less observed. No case has been found where a state has been compelled by any of the rules laid down to continue the obligation of a treaty after the war, and in all cases which have occurred, the treaties have been revived, if at all, by the consent of the parties. The notion was formerly entertained that if the war arose in breach of the provisions of the treaty, the latter was thereby annulled, but if the war arose from a cause independent of the treaty, the rights acquired by such treaty would still subsist.⁸¹

⁸¹Grotius, III. Ch. 20, §§ 27-28; Vattel, Chitty's Trans. (1861) Book IV. § 42. This view is now obsolete. Wheaton, Elements, Dana's ed. (1866) p. 353 n.

"Thus the Treaty of Peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined, that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be devested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions." Wheaton, Elements, Dana's ed. (1866) p. 341.

As to the effect of the War of 1812 on the third article of the Treaty of 1783 between Great Britain and the United States relating to Newfoundland fisheries, see, Wheaton, Elements, Dana's ed. (1866) pp. 342-350.

By the Treaty of Paris, which ended the Crimean War, it was stipulated that until the treaties or conventions existing before the war between the belligerent powers were removed or replaced by fresh agreements, trade should be carried on on a footing of regulations in force before the war, and the subjects of the belligerent states should be treated as between those states as favorably as those of the most favored nation.

1859—Treaty of Zurich. Austria and Sardinia confirmed all treaties in vigor upon the commencement of the war of that year. As between

EFFECT OF BIRTH AND EXTINCTION OF STATES.

Several questions arise in connection with changes in state personality. These cases are as follows: (a) new state arising by revolt, (b) one state being merged in another state and the effect on the treaties of the states so merged, (c) one state being merged as in (b) and effect on the treaties of the state into which merger takes place, (d) cession of state territory and the effect of on treaties between the contracting parties and third states, (e) change in government, as new dynasty, (f) breaking up of a state into component parts, as where a union is dissolved.

Austria and France no revival or confirmation of treaties was stipulated although agreements of every kind existed between them.

1866—Treaty of Vienna between Austria and Italy confirmed afresh the treaty of Zurich. The Treaty of Prague revived, or, in other words, restipulated all the treaties existing between Prussia and Austria so far as they had not lost their applicability through the dissolution of the Germanic Confederation.

1871—The Treaty of Frankfort revived treaties of commerce and navigation, a railway convention having reference to the customs, copyright, conventions and extradition treaties without mentioning any other treaties by which France and Germany were bound to each other.

1905—The Treaty of Portsmouth, which concluded the Russo-Japanese War, did not renew, confirm or revive a single treaty. Hall Int. Law 6 ed. (1909) pp. 380, 381.

1898—Spain, at the outbreak of the war with the United States of America, declared all treaties with the United States cancelled. See 5 Moore, Dig. of Int. L. (1906) p. 372; 2 Oppenheim, Int. L., 2 ed. (1912) p. 129, *n.* 5.

The Treaty of Peace of Frankfort (1871) between France and Germany, and of Portsmouth (1905), between Japan and Russia, placed the commercial relations of the former belligerents on the footing of the most favored nations class pending the negotiation of new conventions. Hershey, Int. L. (1915) p. 361, *n.* 13.

It has been decided that Art 9, of the Treaty of November 19, 1794, between Great Britain and the United States, was not annulled by the breaking out of the war of 1812. 5 Moore, Dig. of Int. L. (1906) p. 372; 2 Oppenheim, Int. L., 2 ed. (1912) p. 130, *n.* 1; 2 Westlake, Int. L. 2 ed. (1913) p. 33.

A treaty calling for continuing performance may be suspended by war, but an honorable state will continue performance after the war. See example of Spain in continuing performance of Treaty of February 17, 1834, of Madrid, calling for the payment of an annual sum in settlement of certain claims of American citizens, after the war with United States in 1898. 5 Moore, Dig. of Int. L. (1906) pp. 376-380.

Westlake, Int. L. 2 ed. (1913) Vol. 2, p. 32, says that the general rule is that war abrogates the treaties existing between the belligerents, and their revival, if desired, must be expressly provided for in the treaty of peace except as to (1) Conventional obligations as to what is to be done during a war between the parties, (2) Transitory or dispositive treaties, (3) Treaties establishing arrangements to which third parties are parties, such as guarantees and postal and other unions. On page 33, he cites as examples of dispositive treaties not abrogated by war, the following:

- (a) Clause in the treaty of 1795 between Great Britain and the United States, giving their respective subjects and citizens the right to hold and transmit land then held by them in the other country notwithstanding alienage.

Where a new state arises by revolt, it is obvious that no treaty made by the state from which it seceded can in any event be said to be binding on it as it was not a party thereto. No case has been found where any such contention has been made.

Where one state merges into another, the state merging disappears from international life, and the treaties which it has made with other states will be of no effect because the party obligated to perform has ceased to exist. Any performance, if they are to continue in effect, will have to be undertaken by the state into which the merger takes place. Ordinarily, the treaties of the latter will cover most of the matters regulated by the treaties of the disappeared state.

Where a state is merged into another, the treaties of the state into which the merger takes place may be affected, and such a merger may involve a violation of such a treaty. If so, it is the same as any other violation, as the merger was the result of the act of the state into which the merger takes place.

In nearly all these cases of merger, the treaty obligations have been taken care of by provisions of the parties at the time, and no case has been found where any state contended that a treaty which was not so provided for was binding under the new state of affairs.⁸²

Where one state cedes part of its territory to another, the question has been raised as to the effect, if any, of such cessions upon the treaty obligations of the state ceded. By analogy to the municipal law, it seems clear that if the treaty relates solely to the territory ceded, as a treaty of boundary, or the performance of the treaty calls for the doing of an act on the ceded territory, then the state to which the property is ceded should assume the obligation of further performance, and also it seems clear that such cession

(b) Treaty of 1760 between France and Sardinia (now applying to Italy) relative to the execution in *either* country of judgments of the other country.

(c) Convention of June 12, 1902, and July 11, 1905, relating to certain parts of private international law.

The same author says, Vol. 2, p. 32, that the distinction between abrogation of treaties and suspension of treaties by war is merely a difference of statement, and that treaties of peace seldom fail to stipulate as to what is the intent as to old treaties; see 1 Halleck, *Int. L.*, 4 ed. (1908) p. 314; 5 Moore *Dig. of Int. L.* (1906) pp. 372-389; 2 Westlake, *Int. L.*, 2 ed. (1913) p. 32; in Vol. 1, p. 298, the same author says that the abrogation of treaties by war is preferable as a generalization to their suspension, because fewer instances will occur if abrogation is taken as the standard. See, Wheaton, *Elements*, Dana's ed. (1866) p. 352 and *n.* 143.

⁸²A theory of state succession has been advanced which is material in this connection, but which is discussed at another place.

would have no effect upon the general treaties of the ceding state having no relation to the territory ceded. A case might arise where one treaty covered both cases, and it would be difficult to separate the various provisions. If the provisions were separable, the case is clear; if not, the matter would have to be adjusted by the consent of the contracting parties. While this question has been discussed at length by the writers, no case appears to have arisen in practice involving any such controversy. It seems that the habitual conduct of states has been such as to prevent any difficulties arising. It will probably rarely occur that any cession of territory will affect a treaty obligation.

Where there is a change in the government of the state, as the succession of a new king, or any other internal modification, there seems to be no reason why the obligation of the state should not continue. Changes in the municipal law have no effect upon the external aspect of the state. A difficult case occurs where a government is totally extinguished by anarchy, as, for instance, during the French Revolution, and a new government arises.⁸³

Where a state breaks up into component parts, as where there is a dissolution of a union or a confederacy, or the state is forced out of international existence by other states, as in the case of Poland, there is a complete disappearance of one of the parties to the treaties which such state may have made, and nobody who could be called upon for performance is in existence. The treaties of such a state, therefore, may well be said to fall to the ground.

An analogous case arises in municipal law, where there is a purely personal contract, as for services, and the party agreeing to render the services dies. There does not seem to be any principle under which the new states appearing in such a case can be called on to fulfill the treaty obligations of the old parent state.⁸⁴

⁸³There has been a difference of opinion as to the effect of change of government on the obligation of treaties. For references to the views of some of the writers, see, 1 Westlake, *Int. L.*, 2 ed. (1910) p. 67, *n.* 1.

⁸⁴Many writers confuse with treaties unilateral obligations such as public loans, etc., and the question of succession to property or territorial rights, both of which, however, are clearly to be distinguished; *e. g.*—Hall *Int. Law*, 6 ed. (1909) p. 91.

Some writers are of opinion that there is a rule of international law binding states to the obligation of treaties upon succession. 1 Oppenheim, *Int. L.*, 2 ed. (1912) pp. 127, 129, *n.* 2.

Wheaton, *Elements*, Dana's ed. (1866) p. 44, says that personal treaties relating to the persons of the contracting parties come to an end at the death of the king or the extinction of his family, but that real treaties, being those relating to subject matters of the convention independently of the contracting parties, continue to bind the state, whatever intervening changes may take place in its internal constitution or rulers, except where

The question whether a treaty binds third parties is doubtful, if there is a question as to whether the treaty binds the parties to it. Treaties have effect on third states and their citizens. The question arises whether a state may acquire rights under a treaty made between other states.⁸⁵

Accession means (a) the formal entrance of a third state into

the treaty relates to the form of government itself, and is intended to prevent any such change in the internal constitution of a state.

Both Sweden and Norway have signified their desire that treaties concluded in common by the two countries during the union should be considered as remaining valid until formally disclaimed, Norway retaining no responsibility for Sweden, and *vice versa*.

1866—On the incorporation of the Kingdom of Hanover into Prussia, the Hanoverian treaties of amity, commerce, navigation, extradition and copyright ceased to exist. They were replaced by the Prussian treaties on the same subjects. 1 Rivier, 73, quoted in 1 Westlake, Int. L., 2 ed. (1910) p. 60.

When Texas was incorporated into the United States, England and France hesitated to admit that their commercial treaties with the latter had fallen to the ground. 1 Westlake, Int. L., 2 ed. (1910) p. 60.

On annexation of Madagascar by France, Great Britain and the United States admitted that they could no longer claim the benefit of the Malagasy tariffs which had been arranged by conventions between them. 1 Westlake, Int. L., 2 ed. (1910) pp. 60, 84.

1871—After the incorporation of Naples in the Kingdom of Italy, it was decided by the courts both in Italy and France that a treaty of 1760 between France and Sardinia, relative to the execution of judgments of the tribunals of the one power within the territory of the other, was applicable to the whole Italian State. Hall Int. Law, 6 ed. (1909) pp. 99 and 21, n. 1.

The separation of Belgium from the Kingdom of the Netherlands and the change wrought thereby in the relations of Holland with the great powers, were held by the United States to justify it in withdrawing from an agreement to accept the King of the Netherlands as an umpire on the northeastern boundary question. When Texas agreed to unite itself to the Republic of the United States, France and England notified her that she did not thereby cease to be bound by her treaty obligations with those powers. Wheaton, Elements, Dana's ed. (1866) p. 48, n. 17.

The annexation of the two Dutch Republics by the British Government in 1900 raised several questions as to the obligation of the absorbing state. Hall, Int. Law, 6 ed. (1909) p. 100, n. 1.

For provisions of the text of the Declaration of Japan as to Treaties of Korea upon merger of the latter state with Japan in 1910, see 1 Oppenheim, Int. L., 2 ed. (1912) p. 128, n. 1.

⁸⁵ Hall Int. Law 6 ed. (1909) p. 338, says that a treaty may affect third parties. If a state of things is thereby brought into existence which other countries are bound to respect, then so long as it is lawful or consistent with the safety of states not parties to it, other states must not prevent or hinder the contracting parties from carrying it out.

A treaty by an independent state affecting a state dependent upon it does not make such dependent state a party to the treaty. 1 Oppenheim, Int. L., 2 ed. (1912) p. 568 n. 1.

The Hay-Pauncefote Treaty between Great Britain and the United States in 1901, and the Hay-Varilla Treaty between the United States and Panama of 1903, provided that the Panama Canal shall be open to vessels of commerce and war of all nations, although Great Britain, the United States and Panama are the only parties.

1881—Boundary Treaty of Buenos Ayres, § 5, provides that the Strait

an existing treaty so that such state becomes a party to the treaty, with all the rights and duties arising therefrom, or (b) the entry of a state into a treaty between other states for the purpose of guarantee.⁸⁶

"Adhesion is * * * such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty."⁸⁷

INTERPRETATION OF TREATIES.

The interpretation of treaties is a matter of construction and a discussion of it will be omitted. There is a great deal of information to be gleaned from the various arbitrations which have taken place and from the writings of the authors as to what interpretations have been in fact placed upon clauses of particular treaties, and what rules, if any, are to be laid down as applicable to the subject. In the note we have referred to a few instances involving the question of construction of a treaty and then referred to the discussion of some of the authors on the subject.⁸⁸

of Magellan shall be open to vessels of all nations although Argentine and Chile only are parties.

1856, March 30—Treaty of Paris annexed to the Peace Treaty of Paris of 1856, provides that Russia shall not fortify the Aland Islands, to which only Great Britain, France and Russia are parties, although the provision was made in the interest of Sweden.

1911—Great Britain contemplated entering into a treaty of general arbitration with the United States of America. She previously notified Japan of her intention on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance, article 4 of which provides that the allies shall never wage a war with a third power with whom one of the allies may have concluded a treaty of general arbitration. 1 Oppenheim, *Int. L.*, 2 ed. (1912) pp. 564-565.

⁸⁶1 Oppenheim, *Int. L.*, 2 ed. (1912) pp. 568, 569.

⁸⁷1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 569.

⁸⁸Hall *Int. Law* 6 ed. (1909) p. 327. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, p. 392, *n.* 1, says that Hall is copious on the subject and that his discussion of it and the cases to which he refers afford much matter for reflection.

Hershey, *Int. L.*, (1912) p. 315 *et seq.*; 1 Halleck, *Int. L.*, 4 ed. (1908) pp. 317-327; 5 Moore, *Dig. of Int. L.* (1906) pp. 249-256; 1 Oppenheim, *Int. L.*, 2 ed. (1912) p. 610; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) p. 94; Wheaton, *Elements*, Dana's ed. (1866) p. 365; Woolsey, *Int. L.*, 5 ed. (1878) p. 180.

Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, pp. 293, 294, thinks that the various rules suggested by the writers are not likely to be of much practical use, and he very cogently points out that rules of interpretation borrowed from the English common law, and applied to the minute drafting of English documents, are not properly applicable to treaties where such minute provisions are generally impracticable, and that in these cases a very liberal rule of interpretation should be adopted.

As to meaning of "most favored nation" clause, see 5 Moore, *Dig. of Int. L.* (1906) pp. 257-319.

EFFECT ON INDEPENDENCE.

A state may by treaty limit itself to certain acts, and there is no more ground to say that a nation thereby impairs its independence than to say that an individual by binding himself to do a certain thing loses his independence, although in each case there is, to that extent, a restriction on freedom of action.

Contracts may, however, be of such a nature as to extinguish personal independence, and the same is true of a treaty. The question is, when does the binding effect of the promise cover the entire activity of the individual or state or so interfere with it as to prevent any freedom of action whatever. A treaty may result in the merger of one state with another or its complete extinguishment; in the same way a state may also terminate its independence by treaty.

DO TREATIES MAKE LAW?

A treaty, as a contract between the parties, does not affect a third state. A great number of treaties between different states on the same matter might indicate a prevailing necessity of that particular rule of conduct or an opinion that it should prevail. On the other hand, the circumstance that the parties thought it necessary to make an agreement indicates that without the agreement there would be no compulsion to act. In the municipal law no court would reason that a rule of law existed from a large number of contracts having been made and then impose the rule on an individual who has not made such a contract.⁸⁹

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⁸⁹Manning, *Int. L.*, 2 ed. Amos (1875) p. 87, takes the correct view that they show that the practice provided for cannot be claimed except under the stipulation of the treaties.

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NOTES.

FEDERAL TAXATION FOR REGULATION AND SOCIAL ADJUSTMENT.—Modern political theory conceives of the sovereign powers exercised by "the state" as arising from the fact of the social solidarity of its inhabitants.¹ These powers residing in the people of the country

¹Duguit, *The Law and the State* c. IX, 31 *Harvard Law Rev.* 161.

at the time of the formation of the constitution were expressly apportioned by it—some to be exercised through the federal or national government, some through the state governments, some through both, and some reserved by the people.² The taxing power may be exercised by both federal and state governments for their individual needs. Thus the federal government may “lay and collect taxes, duties, imposts, and excises”, and “make all laws which shall be necessary and proper for carrying into execution the foregoing powers”,³ while the states obtain their right to exercise the taxing power under the reserve clause, “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.”⁴ That the taxing power to be exercised by the federal government is of the fullest possible extent was early decided in *Veazie Bank v. Fenno*.⁵ Thus the exercise of the power is not limited, as the constitutional phrase might be thought to indicate, to those forms of taxation strictly denominated taxes,⁶ but also includes the power to exact fees;⁷ and, moreover, both federal and state governments are agencies for the exercise of the same power—the full taxing power of “the state” or the sovereign people.

Every compulsory monetary exaction or exercise of the power of taxation may effect two ends, which vary in importance with particular statutes—one, the production or collection of revenue; the other, the regulation of social and economic conditions, *i. e.*, social adjustment. For instance, a general property tax is primarily to produce revenue; the regulatory effect is slight and incidental. On the other hand, the single tax is desired as much for the social adjustment resulting from its employment as for the large revenue produced, while a prohibitive tax on renovated butter is expected to produce no revenue, but to prevent all manufacture of the undesirable article. In every case of taxation regulatory effect in some degree must result; revenue, however, may or may not be produced. Consequently, the power to be exercised by the federal government, since the constitution does not expressly limit its use to exercises in which the production and collection of revenue end predominates, may be exercised when the regulatory end predominates. Contemporaneous comment shows that the framers of the constitution considered that they were permitting the federal government to exercise a taxing power susceptible of uses in which the regulatory end should predominate.⁸ In fact

²Merriam, *American Political Theories*, c. VII; Willoughby, *The Nature of the State*, c. X; 1 Burgess, *Political Science and Comparative Constitutional Law*, 78-81; Willoughby, *The American Constitutional System*, 6-10.

³Constitution, Art. I, § 8.

⁴Constitution, 10th Amendment.

⁵(1869) 75 U. S. 533, 540-1.

⁶For a scientific analysis of the power of taxation, see Seligman, *Essays on Taxation* (8th ed.) c. XIV.

⁷*Cf.* *United States v. Brown* (D. C. 1915) 224 Fed. 135; *Tucker v. Williamson* (D. C. 1915) 229 Fed. 201, 207-8.

⁸“The single article of ardent spirits under federal regulation might be made to furnish a considerable revenue * * * and if it should tend to diminish the consumption of it, such an effect might be equally favorable to the agriculture, to the economy, to the morals, and to the health of the society. There is perhaps nothing so much a matter of national extravagance as these spirits.” Hamilton, *The Federalist* No. 12. In an early

some of the earliest examples of the federal power of taxation were primarily for regulatory ends. For instance, the tonnage taxes were to "punish" foreign countries that did not give fair treatment to American trade and seamen.⁹ Subsequently, the protective tariff was intended to foster certain industries, the 10% tax on state bank notes to drive the notes out of circulation,¹⁰ and the oleomargarine tax¹¹ to aid the farmer and prevent deception. Recent acts of Congress have included the federal inheritance tax¹² whose imposition was expressly demanded in order to limit fortunes; the cotton futures tax,¹³ to prevent speculation; and the white phosphorus match tax,¹⁴ to destroy a dangerous industry. Moreover, federal exercises of the taxing power in which the regulatory end predominates have been repeatedly and without exception sustained by the Supreme Court. Thus Marshall indicated by his famous statement—"The power to tax involves the power to destroy"¹⁵, that regulation might go to the extent of prohibiting or destroying a business or industry involved. And in considering the constitutionality of the taxes on state bank notes and oleomargarine, the court has reaffirmed this view.¹⁶

Yet despite the identity of the taxing power exercised by the federal government and the state, the widespread use of taxation for regulatory ends, and the judicial sanction for such use of the taxing power, some courts feel that a difference in the end makes a difference in the power, and, therefore, attempt to place restrictions upon taxation for regulation that they would not place upon taxation

draft of the constitution, the taxing clause read "The following are the legislative powers * * * to raise money by taxation, unlimited as to sum, for the * * * necessities of the Union and to establish rules of collection." 2 Farrand, Records of the Federal Convention, 142.

⁹Bender, Federal Revenue Law, 288.

¹⁰*Veasie Bank v. Fenno*, *supra*, footnote 5.

¹¹24 Stat. 209 and 32 Stat. 193, 6 Comp. Stat., 1916, §§ 5977-8, 6215, 6239, 6241.

¹²39 Stat. 777.

¹³39 Stat. 476, 6 Comp. Stat., 1916, § 6309.

¹⁴37 Stat. 81, 6 Comp. Stat., 1916, §§ 6271-87.

¹⁵*McCullough v. Maryland* (1819) 17 U. S. 316, 431.

¹⁶*Veasie Bank v. Fenno*, *supra*; *McCray v. United States* (1904) 195 U. S. 27, 24 Sup. Ct. 760; see also *License Tax Cases* (1866) 72 U. S. 462; *United States v. Brown*, *supra*; *National Bank v. United States* (1879) 101 U. S. 1; *Cliff v. United States* (1904) 195 U. S. 159, 25 Sup. Ct. 1. The High Court of Australia on the other hand in a three-to-two decision refused to allow a tax in which the regulatory end predominated, *The King etc. v. Barger* (1908) 6 Commw. L. R. 41. Duties of excise were placed on certain manufactured articles with a provision that the act should not apply if the articles were manufactured under specified favorable conditions as to the remuneration of labor. The notable dissenting opinions of Isaacs, J., and Higgins, J., reviewed and followed the doctrine of the United States cases above cited, see especially *The King etc. v. Barger*, *supra*, 122-9. Mr. D. A. Wells in "The Theory and Practice of Taxation" contends that a so-called tax which looks to anything besides the procuring of revenue is not a tax but an unconstitutional exercise of the taxing power; see also, Waite, *Taxation for the Purpose of Destruction*, 6 Michigan Law Rev. 277. Professor Wagner, 2 Finanzwissenschaft (2nd ed. 1890) 210, includes in the very definition of a tax the socio-political element or duty of regulating and correcting the distribution and use of private property. See Seligman, *op. cit.* 402, 593.

for revenue.¹⁷ Thus in the recent case of *United States v. Doremus* (D. C. W. D. Tex. 1918) 246 Fed. 958, a physician was indicted under the Harrison Anti-Narcotic Act¹⁸ for dispensing opium to a "dope-fiend", the sale not being made in pursuance of an order so to sell addressed by the addict to the physician upon a prescribed form issued in blank for such purpose by the internal revenue commissioner. The Act placed a dollar fee each year upon every person who dispensed narcotics, and the form in question was part of a detailed recording system for each transaction involved in so dispensing. The court dismissed the indictment upon the ground that the form was not necessary to the end of producing or collecting revenue, but necessary only to the "moral", i. e., the regulatory end, and so in conflict with powers reserved to the states under the Tenth Amendment. While recognizing that a monetary exaction by means of a federal exercise of the power of taxation may attempt to regulate social conditions as well as to produce revenue, the court refused to sustain any formal requirements incidental to regulation while admitting it would sustain formal requirements incidental to collecting revenue.

Logically, it would seem that all formal requisites and incidental provisions must fall within an exercise of the power of taxation, i. e., the imposition of monetary exaction, in order to be sustained under that power,¹⁹ precisely as rules and regulations made under a delegation of power to an administrative official must be within the power granted. But just as in the latter case extreme liberality is shown in determining what constitutes "filling in the details" of the power granted,²⁰ so in an exercise of the taxing power the courts will hesitate to find that a particular incidental provision, regardless of whether it is incidental to the revenue or social purposes involved,

¹⁷The theory widely prevails that only those monetary exactions in which the production of revenue end predominates are exercises of the taxing power, while those in which the regulatory end predominates are exercises of the police power. 2 Cooley, *Taxation* (3rd ed.) 1125-8; 64 *Pennsylvania Law Rev.* 502. It is then argued that the federal government being able to exercise only the taxing power and not the general police power, is unable to enact regulatory taxes. Rather the taxing power of "the state" is but one phase of the sovereign or police power. The police powers "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions", Taney, *C. J.*, *The License Cases* (1847) 46 U. S. 504, 583. See Hall, *Cases on Constitutional Law*, 327 n. 1. For a discussion of the identity of the taxing power and the police power and the difficulties in state constitutions and municipal charters that led to the making of a distinction between taxing power and police power, see Seligman, *op. cit.* 402.

¹⁸38 Stat. 785, 6 Comp. Stat., 1916, §§ 6287g-q, and Internal Revenue Regulations No. 35. The constitutionality of the fee imposed for regulatory purposes was sustained in *United States v. Brown*, *supra*; see also *United States v. Sussman* (D. C. E. D. Pa. 1915) 17 *Treasury Decisions Internal Revenue No.* 2239. *Cf.* 38 Stat. 275, 277, 8 Comp. Stat., 1916, §§ 8800-8801f, 6 Comp. Stat., 1916, §§ 6287a-f, which forbid importations of smoking opium, place a three hundred dollar tax per pound on all smoking opium manufactured in this country, and require the filing of inventories and reports.

¹⁹*Cf.* *United States v. Jin Fucy Moy* (1915) 241 U. S. 395, 36 Sup. Ct. 658; *United States v. De Witt* (1869) 76 U. S. 41.

²⁰*United States v. Antikamnia Chemical Co.* (1914) 231 U. S. 654, 667, 34 Sup. Ct. 222, 225.

is not reasonably related to the taxing power and so within it.²¹ But the relationship must not be too remote.²² Moreover, in their opinions the courts have perhaps taken one farther step. They seemingly express themselves as considering it sufficient that the formal requisites be closely related to the revenue purpose for which the monetary exaction is imposed.²³ Similarly, formal requisites closely related to the regulatory purpose ought then to be held valid. And for the most part the federal courts, despite some *dicta* recognizing the distinction drawn in the instant case, have refused to follow it in their decisions, though arriving at their result upon unconvincing logic. Thus, they assume that the formal requisites are really necessary to the collection of revenue though in fact probably of regulatory use only.²⁴ Again, it is suggested, that since Congress could have forbidden all importation of opium and thus prevented all sale, whatever sales it permits may be limited as it sees fit.²⁵ At times, however, the courts have frankly sustained formal requisites which admittedly are unrelated to the collection of revenue.²⁶

But few methods are available in a union such as the United States for procuring uniformity or singleness of action in the legislative treatment of certain problems for which local state action has not sufficed. Uniform laws, reciprocal laws,²⁷ and central action through federal exercise of the power of controlling interstate and foreign commerce and the mails, of the taxing power, and of the war and treaty powers, constitute those most frequently employed. Continual use of the interstate commerce clause has been made during the past

²¹*Felsenheld v. United States* (1902) 186 U. S. 126, 22 Sup. Ct. 740, in which the internal revenue commissioner was allowed to exclude premium coupons from packages of tobacco. *Cf. United States v. Flynn* (1878) 25 Fed. Cas. No. 15123.

²²*United States v. De Witt, supra*; but *cf. Felsenheld v. United States, supra*. In the principal case the relationship would be more easily sustained had the tax been placed upon each dispensation or sale of the drug instead of upon the business of so dispensing or selling.

²³See cases in footnote 24, *infra*. *Ripper v. United States* (C. C. A. 1910) 178 Fed. 24, 28; *cf. United States v. Antikamnia Chemical Co., supra*.

²⁴*United States v. Charter* (D. C. 1915) 227 Fed. 331; *United States v. Dougherty* (D. C. 1900) 101 Fed. 439; *aff'd. Dougherty v. United States* (C. C. A. 1900) 108 Fed. 56; writ of certiorari denied (1900) 181 U. S. 622, 21 Sup. Ct. 926; *Prather v. United States* (1896) 9 D. C. App. 82; *In re Kollock* (1896) 165 U. S. 526, 17 Sup. Ct. 444; *cf. Interstate Commerce Commission v. Goodrich* (1911) 224 U. S. 194, 32 Sup. Ct. 436. In *United States ex rel. Ashley v. Osborne* (Sup. Ct. District of Columbia 1917) Treasury Decisions Internal Revenue No. 2489, a writ of mandamus to compel the commissioner of internal revenue to revoke a regulation necessary to the regulatory purpose only was denied. For contrary *dicta*, see *United States v. Jin Fuey Moy, supra*: "The district court, in treating those ends [regulatory] as to be reached only through a revenue measure, and within the limits of a revenue measure, was right."

²⁵The authority [to forbid importations of opium] being absolute, it follows that the right to assert it must endure and reach beyond the mere capacity of persons to evade its commands to the control of those things which are essential to make the power existing and operative," *Brolan v. United States* (1914) 236 U. S. 216, 35 Sup. Ct. 285. See *United States v. Charter, supra*; *United States v. Brown, supra*.

²⁶*Felsenheld v. United States, supra*.

²⁷*Lindsay, Reciprocal Legislation*, 34 Pol. Sci. Quar. 435.

three decades.²⁸ At present similar strides seem about to be made through federal use of the taxing power.²⁹ It would be regrettable if the courts by analysis, similar to that of the principal case, as to what constitutes the power of taxation should emasculate this effective means of achieving desirable results.

TERRITORIAL OPERATION OF WORKMEN'S COMPENSATION ACTS.—In connection with the territorial operation of workmen's compensation acts, it is of the utmost importance to note at the outset that, as a general rule, a court will not affirmatively enforce the act of a foreign state, inasmuch as these contain specific local provisions as to procedure with which the foreign court is unable to comply.¹ But the existence of a compensation act of one state may be a defence in a

²⁸For example: animal diseases, 32 Stat. 791, 8 Comp. Stat., 1916, §§ 8698, 8700; grain standards, 39 Stat. 482, 8 Comp. Stat., 1916, §§ 8747½-8747¾k; plant quarantine, 37 Stat. 315, 384, 38 Stat. 1165, 8 Comp. Stat., 1916, §§ 8752-8758, 8760-8764; pure seeds, 37 Stat. 506, 8 Comp. Stat., 1916, §§ 8744-7; standard fruit baskets, 39 Stat. 673, 8 Comp. Stat., 1916, § 89071-q; insecticides, 36 Stat. 331, 8 Comp. Stat., 1916, §§ 8765-77; food and drugs, 34 Stat. 768, 39 Stat. 416, 732, 8 Comp. Stat., 1916, §§ 8717-28; meat inspection, 34 Stat. 1260, 8 Comp. Stat., 1916, § 8681; use of narcotics, 38 Stat. 785, § 4, 6 Comp. Stat., 1916, §§ 6287g-q; safety appliances, 27 Stat. 531, and amendments, 8 Comp. Stat., 1916, §§ 8605-23; accident reports, 36 Stat. 356, 8 Comp. Stat., 1916, §§ 8642-7; rates, 24 Stat. 379 and amendments, 8 Comp. Stat., 1916, §§ 8563-8604; hours of service, 34 Stat. 1415, 39 Stat. 61, 8 Comp. Stat., 1916 §§ 8677-80; child labor, 39 Stat. 675, 8 Comp. Stat., 1916, §§ 8819a-F; eight-hour day, 39 Stat. 721; 8 Comp. Stat., 1916, §§ 8680a-d; rebates, 32 Stat. 847, 34 Stat. 587, 8 Comp. Stat., 1916, §§ 8598-99; bills of lading, 39 Stat. 530, 8 Comp. Stat., 1916, §§ 8029-35; prize fight films, 37 Stat. 240, 10 Comp. Stat., 1916, §§ 10416-8; white slaves, 36 Stat. 825, 8 Comp. Stat., 1916, §§ 8812-9; liquors, 37 Stat. 699, 39 Stat. 1069, 8 Comp. Stat. 1916, § 8739.

²⁹Bender, *op. cit.*, v-vi. For the use of another phase of the sovereign or police power, namely, rate-making for social adjustment, see Bye, Social Welfare in Rate-Making, 32 Pol. Sci. Quar. 522.

¹In *Loomis v. Lehigh Valley R. R.* (1913) 208 N. Y. 312, 332, 101 N. E. 907, quoting *Galveston, etc., Ry. v. Wallace* (1912) 223 U. S. 481, 490, 32 Sup. Ct. 205, the court said: "When a statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a particular tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." Bradbury in 9 Neg. Comp. Cas. Ann. at page 931 says: "Under the New Jersey Act claims for compensation are decided by the courts of New Jersey. Therefore, when a claim was made in the New York court under the New Jersey Act no great difficulty was found in applying the New Jersey statute in the same way that it would be applied in the New Jersey courts. But much more serious difficulty would arise should attempt be made in New York to apply the law of Ohio, for instance. In that state the statute provides that the administration of the law is confined to the Industrial Commission of Ohio. Under the case already cited [*Loomis v. Lehigh R. R.*, *supra*] it would appear that the Ohio Industrial Commission would have exclusive jurisdiction. This same difficulty would be present in almost every instance where an attempt was made in one state to enforce the compensation law of another state." As a matter of fact the New York courts have since refused to enforce even the New Jersey act. *Lehmann v. Ramo Films* (1915) 92 Misc. 418, 155 N. Y. Supp. 1032; *McCarthy v. McAllister Steamboat Co.* (1916) 94 Misc. 692, 158 N. Y. Supp. 563; *Verdicchio v. McNab & Harlan Mfg. Co.* (1917) 178 App. Div. 48, 164 N. Y. Supp. 290. However, if the afore-

second state, either to a suit at common law in the second state,² or to a claim for compensation under the act of the second state.³ In view of this negative operation of compensation acts it is essential that some definite principles be formulated to determine what compensation act is to be recognized as binding on the employer or employee. For instance, a workman enters into a contract of employment in state A, in reference to work to be done principally in state B, and is injured in state C. Which state's act is to be applied? This suggests the problems confronting the courts.

In *Gould's Case*,⁴ apparently the first American authority on this question, the court adopted in connection with the operation of the Massachusetts statute, the rule that the law of the place of the injury governs the right to recover. However, when next the question arose, the doctrine of this case was repudiated, and it was held in effect that workmen's compensation is a regulation of the contract of employment. The courts, acting on this theory, disregarded the place of injury and applied the *lex loci contractus*.⁵ But in a few cases where the contract was made in reference to performance in another state, the law of the place thus designated was given preference over the *lex loci contractus*.⁶ The recent case of *Banks v. Howlitt* (Conn. 1918) 102 Atl. 822 represents an application of this most recent tendency. The plaintiff's decedent entered into an agreement in New York to work in Connecticut where he was killed. The court of Connecticut allowed the plaintiff to recover under the act of that state, relying upon the fact that the place of principal performance was within that jurisdiction.⁷

The result thus reached may, in view of the adherence of the courts of Connecticut to the contract theory,⁸ best be explained as a choice under that theory between the place of making and the place of principal performance. This view of the decision is the more probable in that Connecticut applies in regard to the obligations arising under contracts in general the law of the place of performance.⁹ The decision, therefore, represents a logical application of the contract theory.¹⁰ But the interesting question suggested is,

mentioned difficulties could in any instance be overcome, there would be no objection to the affirmative enforcement of a foreign statute. See *Kennerison v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372; *Douthwright v. Champlin* (Conn. 1917) 100 Atl. 97.

²*Pendar v. H. & B. American Machine Co.* (1913) 35 R. I. 321, 87 Atl. 1; cf. *Schweitzer v. Hamburg Amerikanische P. A. C.* (1912) 149 App. Div. 900, 134 N. Y. Supp. 812; 18 Columbia Law Rev. 377 and cases cited therein.

³*Connor, Employers' Liability and Workmen's Compensation and Liability Insurance* § 19.

⁴(1913) 215 Mass. 480, 102 N. E. 693.

⁵*Deeny v. Cobb Lighterage Co.* (1913) 36 N. J. L. J. 121; *Kennerison v. Thames Towboat Co.*, *supra*.

⁶*Gardner v. Horseheads Construction Co.* (1916) 171 App. Div. 66, 156 N. Y. Supp. 899; *Johnson v. Nelson* (1915) 128 Minn. 158, 150 N. W. 620; see *Foughty v. Ott* (W. Va. 1917) 92 S. E. 143.

⁷*Davidheiser v. Hay Foundry & Iron Works* (1914) 37 N. J. L. J. 119 is authority in support of the principal case.

⁸*Kennerison v. Thames Towboat Co.*, *supra*.

⁹*Beggs & Co. v. Bartels* (1900) 73 Conn. 132, 46 Atl. 874.

¹⁰27 Yale Law Journal 707.

whether, regardless of divergent views as to the law governing the obligation of contracts, the same result should not have been reached. In other words, should not the law of the place of principal performance be applied in every case as the law of the place most concerned with the relationship of master and servant?

The question raised in the preceding paragraph cannot be answered without some examination of the origin and scope of workmen's compensation acts; for the courts will naturally adopt that theory which best effectuates the real purpose of such legislation. The common law theory of the reciprocal rights and liabilities of master and servant was a doctrine of individual rights arising from the relationship which the contract of hire created.¹¹ The servant could not recover unless the master was negligent and he himself was not. But modern industrial conditions showed clearly that many injuries arising in the course of the employment, although not due to the fault of either master or servant, are unavoidable incidents of industrial activity; in fact, negligence itself may be said to be such an incident.¹² A number of jurisdictions, recognizing the inadequacy of the common law, adopted workmen's compensation acts, whereby the burden of industrial injuries is thrown upon the employer as an expense of production and thus shifted to the consumer on whom in justice it should rest.¹³

To lay down a rule that the injury must occur within the territorial limits of the state vitiates the purpose of workmen's compensation in two respects: it gives a remedy in the forum when the burden should be borne by the industry of another jurisdiction,¹⁴ and gives no remedy for injuries which are a proper charge on the industries of the forum.¹⁵ Similarly, the contract theory, in jurisdictions where the rule of *lex loci contractus* applies, fails to effectuate the purpose of workmen's compensation, in that the place where the contract is created as a matter of law may have no relation to the place where the industrial activity of the workman takes place. The application of the contract theory in those jurisdictions which adhere to the rule that the obligation of contracts is governed by the law of the place of performance reaches a proper result, since the state within whose territorial limits industrial activity—the performance of the contract—takes place would seem to be the place where legislation should be made governing such activity and where rights and duties under such legislation should be adjudicated. But it would seem more natural to say that a regulation of industrial activity is a regulation of the relationship between master and servant and

¹¹10 Columbia Law Rev. 1 *et seq.*

¹²25 Harvard Law Rev. 129 *et seq.*

¹³25 Harvard Law Rev. 129 *et seq.*; *Rheinwald v. Builders' Brick & Supply Co.* (1915) 168 App. Div. 425, 153 N. Y. Supp. 590.

¹⁴This would be the result where the workman is principally employed in state A and injured in state B. If he is allowed compensation in state B, it would be a charge on the industry of state B whereas his services are really in connection with that of state A.

¹⁵In *Kennerson v. Thames Towboat Co.*, *supra*, at p. 375 the court said: "If our Act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the State, and the employee or his dependents may not collect the same."

that where this relationship is domesticated the rights and liabilities under workmen's compensation attach.¹⁶ A court adopting this point of view may, in every case, reach a just result, regardless of its local law concerning the obligation of contracts.

The recent tendency in legislation has been to recognize that workmen's compensation is essentially in the nature of industrial insurance, by providing for a fund owned or controlled by the state.¹⁷ Under statutes of this character it is highly probable that the state intends that the premiums paid by those carrying on industries within the state should be used to pay those workmen only who are engaged in such industries. It is submitted that the trend is in favor of employing workmen's compensation as a means of regulating local industry, and that the courts will ultimately adopt this point of view.

ACQUISITION OF DOMICIL IN FOREIGN COUNTRIES.—Many important questions are solved with reference to the legal status of the person or persons whose rights or liabilities are the subject of controversy. Thus the right of an individual to make a will¹ disposing of personally, the validity of a particular marriage,² jurisdiction sufficient to grant a divorce³ will depend on the legal relationship between one or more persons and a particular jurisdiction. It was generally agreed up to within the last one hundred years that one who was domiciled in a particular locality should be governed by⁴ the laws of that locality in respect to such matters as those mentioned above. Domicil was defined as residence within the locality with the intention permanently to remain there.⁵ More recently, however, many European nations have either discarded domicil as the test of the existence of a legal relationship sufficient to determine civil status and substituted therefor the criterion of nationality,⁶ or have required, as has been thought, that some further step beyond permanent residence be taken in order that this relationship should exist.⁷ The common law, on the other

¹⁶In *Kenny v. Union Ry.* (1915) 166 App. Div. 497, 152 N. Y. Supp. 117, at p. 500, the court said: "While the relation of employer and employee as defined by the statute must have existed at the time deceased sustained the injury, it matters not whether the employment was under a contract concededly valid as to both parties, or under a contract voidable at the election of the employer, or whether the liability of the employer for wages was fixed, or determinable under *quantum meruit*. The vital question is whether the relation of employer and employee existed between the deceased and the railway company, and the facts being conceded, the question is one of law."

¹⁷Connor, *op. cit.* § 29.

¹*Goods of Maraver* (1828) 1 Hagg. Ecc. 498; *Mayor of Canterbury v. Wyburn* [1895] A. C. 89.

²*Sottomayer v. De Barros* (1877) 3 Prob. D. 1; *cf. Harral v. Harral* (1884) 39 N. J. Eq. 279.

³*Le Mesurier v. Le Mesurier* [1895] A. C. 517; *Hunt v. Hunt* (1878) 72 N. Y. 217.

⁴Westlake, *Private International Law* (5th ed.) Chapters I-II, contains an historical résumé of the conflicting theories of legal status.

⁵For various definitions of domicil see Dicey, *Conflict of Laws* (2nd ed.) App. Note 6.

⁶Westlake, *loc. cit.*

⁷See *Collier v. Rivaz* (1841) 2 Curt. Ecc. 855; but see *Bremer v. Freeman* (1857) 10 Moore P. C. 306, 363; *Dupuy v. Wurtz* (1873) 53 N. Y. 556; *Harral v. Harral*, *supra*.

hand, has clung to the test of domicile. As long as the particular case involves only countries in which the principles of the common law apply, no unsurmountable difficulties are encountered. Since all common law jurisdictions apply the test of residence coupled with intention permanently to remain there in fixing civil status there is no need of examining the foreign law in order to determine the domicile. But where a will is made, a marriage celebrated, or a divorce granted in a jurisdiction where domicile in the common law sense is not recognized, it may well be that according to the law of the forum the case ought to be governed by the foreign law of wills, etc., while according to the law of the foreign state an entirely different result would be reached. In this situation several courses are open to the court of the forum. It may apply the foreign law of wills, etc., as the *lex domicilii* without regard to the attitude of the courts of the other jurisdiction,⁸ it may adopt the theory commonly known as the *renvoi*, whereby the conflicts law of the other country is applied;⁹ or it may declare that a domicile was never acquired in that locality as a matter of law because the propositus never possessed the legal rights which normally flow from a common law domicile.¹⁰

The courts of any particular jurisdiction have the right and duty of determining whether a certain individual is or is not bound by its internal law, although the international recognition of its decision will depend on the policy of the various foreign tribunals.¹¹ But this right and duty does not extend, it is submitted, to a determination solely with reference to its own laws of the question whether or not the propositus is bound by the laws of another state.¹² It would seem unsound, therefore, for a common law court to apply the common law doctrine of domicile so rigorously that if the individual is domiciled in a foreign country within the common law meaning of the term domicile, the foreign law of wills, etc., must be applied. And yet does not a determination of domicile by a purely factual criterion logically demand such a result?

In the majority of the reported cases, however, the courts have wisely refused to press the common law doctrine of domicile to this extreme, and have by the so-called doctrine of *renvoi* applied some other law than that of the permanent residence. The *renvoi* presupposes that a legal tie between the individual and the law of the

⁸Hamilton v. Dallas (1875) 1 Ch. D. 257 (*semble*).

⁹See articles by Ernest G. Lorenzen, 10 Columbia Law Rev. 190, 339, and Ernst O. Schreiber, 31 Harvard Law Rev. 523.

¹⁰See footnote 18, *infra*.

¹¹The public policy of jurisdictions following the common law might, therefore, prevent the recognition of a legal tie asserted by a foreign country which is based on mere physical presence or nationality. But it is another matter to say that where permanent residence exists the foreign country must recognize the legal tie. And it is absurd to declare that this legal tie gives rise to no substantive rights or liabilities, but points out the particular conflicts rule applicable to the case. This, it would seem, is an inherent vice in the doctrine of *renvoi*.

¹²"A défaut d'une souveraineté supérieure qui impose sur souverainetés concurrentes les limites de leur autorité respective, il ne peut évidemment appartenir qu'à l'Etat de tracer lui-même les limites de sa souveraineté et de la souveraineté d'autrui sur son territoire. Il serait absurde de supposer que l'Etat français a pu abandonner à l'Angleterre ou à l'Allemagne le soin de lui indiquer jusqu'où va sa propre souveraineté, et c'est cependant ce qu'admet la théorie du renvoi." Pillet, Droit International Privé 165.

foreign state exists, but that the law of the foreign state is its entire jurisprudence and not merely its ordinary substantive law.¹³ Hence, it is said, the court of the forum may apply the foreign rules of conflicts of laws and apply the substantive law which these rules show to be appropriate.¹⁴ The doctrine of *renvoi* has been discussed *pro* and *con*, but it is unnecessary in this place to re-examine it anew, since the courts have applied it not because of its intrinsic merits but by reason of the results reached through its use.

A brief examination of a few important decisions will perhaps make the matter clearer. In *Collier v. Rivaz*,¹⁵ the testator had an Irish domicile of origin which was subsequently abandoned in favor of an English domicile of choice. At the time of his death he was *de facto* domiciled in Belgium. His will was in the English form, and an examination of Belgian law convinced the English court that one who, like the testator, had not received authorization from the proper Belgian authorities could not make a will in Belgian form. It was held that its validity must be determined by the English law. Some years later, a similar state of facts arose as to a *de facto* domicile in France in *Bremer v. Freeman*.¹⁶ In this case the court was of the opinion that authorization was not required in France and held that a will in the English form made by an Englishwoman permanently residing in France was invalid. The difference in the results reached is most obviously and satisfactorily explained by the different conclusions of the courts as to the law of the foreign jurisdictions governing the classes of persons who were entitled to make a will in the form prescribed by their own laws. Finally in the leading case of *In re Johnson*,¹⁷ the court suggested as alternative grounds for its decision the conception of legality under the law of the place where domicile is claimed as a necessary element of domicile,¹⁸ and the doctrine of *renvoi*. The intestate had a domicile of origin in the British colony of Malta. She left Malta and resided permanently in

¹³If the foreign state also applies the doctrine of *renvoi*, there arises a possible *circulus inextricabilis*. Pillet, *op. cit.* 168. Therefore, the reference to the foreign law must be to its conflicts law exclusive of the doctrine of *renvoi*. Westlake, *op. cit.* 31, *et seq.*

¹⁴See articles cited in footnote 9, *supra*, for references to the literature of the subject.

¹⁵*Supra*, footnote 7.

¹⁶*Supra*, footnote 7.

¹⁷[1903] 1 Ch. 821. Followed in *In re Bowes* (1906) 22 T. L. R. 711.

¹⁸"When the Court has ascertained that the domicile of origin has been displaced by the domicile of choice, distribution of movables follows the domicile of choice; but in order to establish a new domicile of choice the Court has to be satisfied that it has been adopted *animo et facto*—it is essential that there should be both *animus* and *factum*. When, therefore, the law of the land said to be chosen as the new domicile disregards domicile and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicile *de facto*; and the case is accordingly remitted to this Court as a case where the *propositus* has intended but has failed to obtain an effectual domicile of choice. No change is effectual unless the *factum* is proved, and the *factum* cannot exist in a country where the law refuses to recognize it. The result is that this Court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the *propositus* therefore is left with his domicile of origin unaffected." *Per* Farwell, J., at pp. 827-828.

Baden for some fifty years. According to the court's opinion as to the law of Baden the property of non-nationals was to be distributed according to the nationality of the decedent, which in this case was English. The court distributed the property in accordance with the law of Malta. From the point of view of *renvoi* the case might be criticized on the ground that English and not Maltese law should have been applied.¹⁹ But, if the other ground suggested by the court is sound, the result reached is correct. The law of the domicile of origin must be applied since the original domicile was not displaced by any legally effective change.²⁰

In the recent case of *Casdagli v. Casdagli* (1918) 34 T. L. R. 195, which involved the question of the domicile of a privileged foreigner permanently residing in Turkish territory, the necessity of introducing some idea of legality under foreign law in the definition of domicile was clearly shown. An Englishman had permanently settled in Egypt and married there. While temporarily in England his wife brought an action for divorce in an English court. The husband filed a plea to the jurisdiction of the court on the ground that the matrimonial domicile was in Egypt. Under the treaty between Great Britain and Turkey in force at the time suit was brought, British subjects were not subject to the jurisdiction of the Turkish courts but were to sue and be sued in the British Consular Courts. These courts, however, had no matrimonial jurisdiction. The plea was overruled²¹ and on appeal this decision was affirmed by a divided court. The basis of the majority opinion was that, since the source of law governing privileged persons living in foreign countries which grant rights of extra-territoriality is the state to whose subjects these rights are granted, the defendant could not have obtained a Turkish or Egyptian domicile. Scrutton, L. J., contended that the source of law in such cases was the territorial sovereign; who permitted the officers of the other nations to enforce as his agents the national law of the privileged foreigner. Hence, he concluded, the defendant did acquire a foreign domicile and the domestic tribunal had no jurisdiction to grant the wife a divorce. Assuming that his view as to the true nature of extra-territoriality is correct,²² it would seem, nevertheless, that the situation in the present case involved more than mere extra-territoriality. There was as to matrimonial causes involving Englishmen an entire absence of Turkish law or Turkish jurisdiction. Therefore he might well have declared, on the reasoning of *In re Johnson*, *supra*, that for the purpose of determining their marital status the parties in the present case could not have obtained a domicile in Egypt.²³

¹⁹See Baty, *Polarized Law* 118, *et seq.*

²⁰If a domicile of choice is abandoned without a new domicile of choice being acquired, the domicile of origin revives. *Udny v. Udny* (1869) 1 H. L. Sc. 441. The American rule is apparently *contra*. Wharton, *Conflict of Laws* (3rd ed.) §§ 59, 60; but see Story, *Conflict of Laws* (8th ed.) 54n. (c).

²¹*Casdagli v. Casdagli* (1916) 34 T. L. R. 96.

²²The nature of extra-territoriality is a matter of dispute among the courts and the text writers. The view of the majority judges in the principal case is supported by *In re Tootal's Trusts* (1883) 23 Ch. D. 532; *Abdul-Messih v. Chukra Farra* (1888) 13 App. Cas. 431. These decisions are criticized in Westlake, *op. cit.* 344. *Mather v. Cunningham* (1909) 105 Me. 326, 74 Atl. 809, and *In re Young John Allen* (1907) 1 Am. J. Int. Law 1029, are *contra*. See also articles by Charles H. Huberich in 24 Law Q. Rev. 245, 31 Law Q. Rev. 447.

²³See footnote 18, *supra*.

Since the question involved in *Casdagli v. Casdagli* was jurisdictional, and not one calling for the application of foreign law, the doctrine of *renvoi* would not have enabled the court to solve it. But the principle which it lays down is: it is submitted, equally applicable to the *renvoi* cases, and explains the results reached in such cases in a more realistic and logical manner than that employed by the jurists advocating *renvoi*.

CONVICTION OF AN ACCESSORY AFTER ACQUITTAL OF THE PRINCIPAL.—

At common law it was said that the accessory "followed his principal like a shadow".¹—without a principal there could be no accessory.² No accessory could be tried and convicted unless the principal felon had been previously either convicted or outlawed, and evidence thereof given to the jury, or unless the principal be charged in the same indictment with the accessory and tried at the same time, in which latter case the jury must inquire first into the guilt of the principal, and if they found him not guilty, then acquit the accessory; but if they found him guilty, they must then inquire into the guilt of the accessory.³ To this there was but one exception,—where the accessory consented to be tried before the principal. Even then proof of the guilt of the principal was indispensable, and upon the conviction of the accessory, judgment against him had to be suspended until the principal had been prosecuted and found guilty. But if the accessory were acquitted of the charge, the acquittal was good and the accessory discharged.⁴ It followed, therefore, that anything which prevented the conviction⁵ of the principal, such as his death,⁶ or standing mute,⁷ or being admitted to the benefit of clergy,⁸ or a pardon before conviction,⁹ prevented the trial of the accessory. The record of the acquittal of the principal was consequently an absolute bar to the prosecution of the accessory.¹⁰ Since, however, there was an added

¹Bishop, New Criminal Law (8th ed.) § 666.

²*Commonwealth v. Phillips* (1820) 16 Mass. *423.

³1 Hale, Pleas of the Crown 624; see *State v. Duncan* (1845) 28 N. C. 98; *United States v. Hartwell* (1869) 26 Fed. Cas. No. 15318; *Ex parte Bowen* (1889) 25 Fla. 214, 6 So. 65.

⁴1 Hale, *op cit.* 623; see *Commonwealth v. Andrews* (1807) 3 Mass. 126; *State v. Chittum* (1828) 13 N. C. 49; *Ex parte Bowen, supra*.

⁵At common law a judgment of conviction of the principal felon, and not merely the verdict of a jury as to his guilt, was prerequisite. *State v. Duncan, supra*; *Daughtrey v. State* (1903) 46 Fla. 109, 35 So. 397.

⁶*Commonwealth v. Phillips, supra*; see *Moore v. State* (1899) 40 Tex. Cr. 389, 51 S. W. 1108; but *cf. Self v. State* (1873) 65 Tenn. 244.

⁷See *Rex v. Burrigge* (1735) 3 P. Wms. *439, *485; *State v. Duncan, supra*.

⁸*Supra*, footnote 7.

⁹*Supra*, footnote 7. But not a pardon after conviction. *Commonwealth v. House* (1899) 10 Pa. Super. Ct. 259. Where a judgment of conviction against a principal was reversed, the accessory was *ipso facto* discharged. *Ray v. State* (1882) 13 Neb. 55, 13 N. W. 2.

¹⁰*McCarty v. State* (1873) 44 Ind. 214; see *Ex parte Bowen, supra*; *State v. Jones* (1888) 101 N. C. 719, 8 S. E. 147; *cf. United States v. Crane* (1847) 25 Fed. Cas., No. 14888; but *cf. Regina v. Pulham* (1840) 9 C. & P. 280.

issue in the prosecution of the accessory, the record of the conviction of the principal was *prima facie* evidence of the guilt of the principal of the crime alleged,¹¹ which could be rebutted by the accessory,¹² and it was no evidence of the guilt of the accessory.¹³ Since the crime of accessory was not a substantive one, but wholly ancillary to that of principal, the common law revolted at what it considered the absurdity of an accessory without a principal.¹⁴

The manifest failure of justice in permitting one "whose will contributed to the commission of a felony committed by another while himself too far away to aid in the felonious act", as the accessory before the fact was defined,¹⁵ to escape punishment merely because his principal was without the pale of the law,¹⁶ caused statutes to be adopted in many jurisdictions providing that the one acting (the principal), the one present, aiding and abetting (the accomplice), and the one absent, aiding and abetting (the accessory before the fact) be equally guilty. All of these statutes permitted the accessory before the fact to be indicted and tried independently of, and before, the trial of the principal.¹⁷ Some of these were construed merely to permit the trial and conviction of the accessory without the preliminary of the trial and conviction of the principal, but required the state still to show the guilt of the principal as a condition precedent to the conviction of the accessory.¹⁸ Others were held to make the accessory before the fact guilty of a substantive crime, and in effect a principal, and permitted his conviction irrespective of the guilt of the principal.¹⁹

¹¹State v. Chittam, *supra*; Anderson v. State (1879) 63 Ga. 675; Cantrell v. State (1913) 141 Ga. 98, 80 S. E. 649; State v. Fiore (1913) 85 N. J. L. 311, 88 Atl. 1039. The state may introduce evidence *aliunde*. See Commonwealth v. House, *supra*; Martin v. State (1894) 95 Ga. 478. That judgment of conviction of the principal is indispensable if the principal has been tried first, see State v. Duncan, *supra*. That judgment is conclusive as to the fact of conviction of the principal, see State v. Chittam, *supra*; Anderson v. State, *supra*.

¹²See Cantrell v. State, *supra*; Rex v. Smith (1783) 1 Leach C. C. 323.

¹³See Thompson v. State (1914) 16 Ga. App. 832, 84 S. E. 591; Keithler v. State (1848) 18 Miss. 192; Anderson v. State, *supra*.

¹⁴4 Bl. Comm. *323; see Smith v. State (1872) 46 Ga. 298.

¹⁵1 Bishop, *op. cit.* § 673.

¹⁶See State v. Duncan, *supra*; State v. Ludwick (1868) 61 N. C. 401.

¹⁷But *cf.* footnote 20, *infra*.

¹⁸Burn's Ann. Ind. Stat. (1914) § 2095: "Every person who shall aid or abet in the commission of a felony, or who shall counsel, encourage, hire, command, or otherwise procure a felony to be committed, may be charged by indictment or affidavit, tried and convicted in the same manner as if he were a principal, either before or after the principal offender is charged, indicted, or convicted."

In Baxter v. People (1845) 7 Ill. 578, the court, referring to a similar statute, said, "Under our statute, an accessory may be indicted and punished as principal, and in such a case it would be necessary for the prosecution to make out the guilt of the principal, before the jury could find the defendant guilty of the murder by being accessory to it."

¹⁹In New York, the jurisdiction of the principal case, the statute (Consol. Laws, c. 40, § 2) reads as follows: "Principal. A person concerned in the commission of a crime, whether he directly commits the act constituting the offence or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a 'principal.'"

In People v. Bliven (1889) 112 N. Y. 79, 19 N. E. 638, the court said,

Still others were construed, in effect, as giving the state an election whether to treat the accessory in his common law capacity or as a substantive criminal; if the former, the procedure followed the first line; if the latter, the second.²⁰ Consequently, while under the first construction such statutes authorized the conviction of the accessory before or after the conviction of the principal, they did not authorize his conviction after the acquittal of the principal; and, therefore, the acquittal of the principal was still an absolute bar to the conviction of the accessory,²¹ whereas the record of the conviction of the principal was still *prima facie* evidence of the guilt of the principal.²² As to the second construction, since the accessory was now a principal, the state need no longer prove the guilt of the principal to make out its case against the accessory, and consequently the record of the trial of the principal, if it had taken place, whether it lead to conviction or acquittal, was wholly irrelevant.²³

These statutes are in general conspicuously silent as to the accessory after the fact,—the one who harbored a felon, knowing him to be such, or rendered him any other assistance so as to enable him to elude punishment.²⁴ It is true that the accessory after the fact is now under some statutes a substantive criminal, in the sense that he may be tried and convicted before the trial and conviction of his

"The purpose and effect of the section are to abolish the distinction which heretofore existed in cases of felony between a principal and an accessory before the fact, the principal being present and either committing the act himself or aiding in its commission, and the accessory before the fact being absent, but counseling and procuring its commission. The case of an accessory before the fact has now, by means of this section, been made the case of a principal, and he occupies, therefore, the same position in the case of felony as such an individual heretofore occupied in cases of treason and of misdemeanor."

²⁰Florida Compiled Laws (1914) § 3179: "Whoever counsels, hires, or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction, or may be indicted and convicted of a substantive felony, whether the principal has or has not been convicted or is or is not amenable to justice."

Under a similar statute, it was declared in *Ex parte Bowen*, *supra*, that the first part of such statute preserved the common law, and that it was only where the accessory was indicted as on a substantive felony that he could be convicted without reference to the conviction of the perpetrator. It seems that under such statute one indicted as accessory could not be convicted before his principal, and to this extent, perhaps, the generalization that an accessory before the fact may always be tried before his principal should be limited. Cf. *State v. Bryson* (N. C. 1917) 92 S. E. 698.

²¹*McCarty v. State*, *supra*; *State v. Ludwick*, *supra*; *State v. Jones*, *supra*; see *Baron v. People* (N. Y. 1851) 1 Parker Crim. R. 246; May, *Crimes* (3rd ed.) § 70. And even where judgment of conviction has been rendered against the accessory, if the principal be thereafter acquitted, the accessory must be discharged. *McCarty v. State*, *supra*.

²²*State v. Moseley* (1884) 31 Kan. 355, 2 Pac. 782; see *State v. Gleim* (1895) 17 Mont. 17, 41 Pac. 998.

²³*Regina v. Hughes* (1860) Bell's C. C. 242 (subsequent acquittal of principal); *People v. Bearss* (1858) 10 Cal. 68 (prior conviction of principal); see *Steely v. Commonwealth* (1909) 132 Ky. 213, 116 S. W. 714; *Rooney v. United States* (C. C. A. 1913) 203 Fed. 928 (prior acquittal of principal).

²⁴*Bishop, op. cit.* § 692.

principal;²⁵ but this procedural change would seem to be the only deviation from the common law.²⁶ This divergence can best be explained by the fact that there was felt to be a fundamental distinction between the accessory before the fact and the accessory after the fact; that the former is in reality an aider and abettor, whose will contributes to the fact itself, whereas the guilt of the other is scientifically independent of the fact.²⁷ In addition to the fact that these statutes contain no word permitting the conviction of the accessory after the fact subsequent to the acquittal of his principal, it seems that the reason for the change by which such result was effected in the case of the accessory before the fact is entirely absent in the case of an accessory after the fact; that while one may well aid and assist in the preparation of a crime, and incur punishment thereby though the actual perpetrator thereof escape punishment, it is still impossible to harbor and conceal a felon when such person has been adjudicated not to have been a felon.²⁸ Hence, it would seem, that where the accessory after the fact is tried before the conviction of his principal, the state must still prove the commission of the crime and the harboring and concealing.²⁹ Furthermore, when the accessory after the fact is tried after the conviction of his principal, the record of the conviction should be taken as *prima facie* evidence of the principal's guilt.³⁰ Where, however, the accessory after the fact is tried after the acquittal of his principal, the record of acquittal should be taken as conclusive that the principal is not a felon, and

²⁵The crime of accessory after the fact has by no means been ignored by the codifiers. Under the New York Penal Law (Consol. Laws, c. 40, § 2) it is defined as follows: "Accessory. A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an 'accessory' to the felony." And in § 1934 it is provided that "an accessory to a felony may be indicted, tried, and convicted * * * whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction." It is submitted, however, that the nomenclature of the New York statute which designates the common law accessory before the fact as "principal" and the common law accessory after the fact as "accessory" is significant. See also *United States v. Crane, supra*.

²⁶See *State v. Davis* (1883) 14 R. I. 281.

²⁷*Bishop, op. cit.* § 592; 4 Bl. Comm. *40.

²⁸It would seem that the reasoning of the court in *State v. Ludwick, supra*, footnote 16, in respect to accessory before the fact is particularly applicable to the case of accessory after the fact: "This statute alters the common law, and puts out of the way the necessity of a prior conviction and attainder of the principal felon, but it has not even the most remote bearing upon a case where the person charged as principal felon has been tried and acquitted. That is left as at common law, and the notion that when it is decided by the judgment of the law that no felony has been committed, and that the person charged as the principal felon is not guilty, one charged as being accessory * * * can be tried and convicted, is out of the question, for there is no fact and no principal."

²⁹*United States v. Crane, supra*; see *Daughtrey v. State, supra*; cf. *Edwards v. State* (1887) 80 Ga. 127, 4 S. E. 268.

³⁰*West v. State* (1889) 27 Tex. Cr. 472; see *United States v. Hartwell, supra*; *Thompson v. State, supra*.

consequently that the accessory is not guilty as charged,³¹ especially since the state, by the principle of second jeopardy, can never again inquire into the guilt of the principal. There is no injustice in the position that a record of acquittal shall be conclusive against the state, whereas a record of conviction shall be only *prima facie* evidence against the accessory. The state in its action against the principal had full opportunity to call and examine witnesses, and should be bound by an unfavorable result, involving the precise issue, to which it was party; whereas the accessory had not such opportunity to be heard, and should not, therefore, be prejudiced by a result unfavorable to him.³² In the light of this analysis, it is submitted that the court, in the recent case of *People v. Beintner* (Sup. Ct. 1918) 168 N. Y. Supp. 945, which declared that in the trial of an accessory after the fact subsequent to the acquittal of his principal, the record of the acquittal of the principal was not admissible for any purpose, and which held that such acquittal was not a bar to the prosecution of the accessory, was in error, and that the indictment in that case against the accessory should have been dismissed.

THE CONFLICT IN THE CONCURRENT OPERATION OF STATE AND FEDERAL TAXES.—Inheritance taxation has come to be relied upon, both in this country and abroad, as an effective and just method of raising revenue. This mode of taxation has been recognized as a fitting instrument especially in the hands of the state governments because of their control over the descent and distribution of property upon death.¹ The federal government, nevertheless, imposed such taxes in the past² and, by the Act of September 8, 1916,³ has again entered the field. The question obviously arises: to what extent shall each government recognize the tax of the other for the purpose of assessing its own?

In the first instance, it is necessary to examine the nature of in-

³¹*Supra*, footnote 28.

³²Spencer, J., in *Maybee v. Avery* (N. Y. 1820) 18 Johns., *352, expresses this idea by way of *dictum* as follows: "It is, undoubtedly, a rule, that to give a verdict, and judgment thereon in evidence, it must be upon the same point, and between the same parties or privies. The reason why it must be between the same parties is, that otherwise a man would be bound by a decision in which he was not at liberty to cross-examine the witnesses; and generally, the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict, if against him, cannot avail himself of it. One of the exceptions to the rule is, that where the matter in dispute is a question of public right, in that case, all persons standing in the same situation as the parties, are affected by it. It appears to me that a verdict on an indictment forms another exception, and upon the same principle." Cf. *State v. Chittam*, *supra*.

¹See *Mager v. Grima* (1850) 49 U. S. 490; *Eyre v. Jacob* (1858) 55 Va. 422; *State v. Alston* (1895) 94 Tenn. 674, 30 S. W. 750; *In re Joyslin* (1903) 76 Vt. 88, 56 Atl. 281.

²Act of July 6, 1797, 1 Stat. 529, c. 11; Act of July 1, 1862, 12 Stat. 485, c. 119; Act of June 30, 1864, 13 Stat. 285, c. 173; Act of June 13, 1898, 30 Stat. 464, c. 448. For a brief account of federal inheritance taxation, see *Knowlton v. Moore* (1900) 178 U. S. 41, 50, 20 Sup. Ct. 747.

³Estate Tax, 39 Stat. 777, c. 463; amended by an increase of rates, Act of March 3, 1917, 39 Stat. 1002, c. 159; amended by new rates in addition to those already existing. Act of October 3, 1917, First Sess. 65th Congress 324, c. 63.

heritance taxes in order fully to understand the problem under consideration. They are said to be imposed, not upon property, but upon succession.⁴ In attempting to be more definite, some courts have stated that the tax is upon the privilege of the decedent to transmit;⁵ others, that it is upon the privilege of the beneficiary to take.⁶ If the desired result can be reached more smoothly by traveling on the one theory rather than on the other, the courts have not hesitated to employ the one best suited.⁷ It would seem that neither conception excludes the other. In order that an inheritance tax be levied, it is necessary that property pass from a decedent to a beneficiary. Such passing of property necessarily implies the power of the decedent to transmit and the privilege of the beneficiary to receive. To pick out one of these elements as the subject of the tax is merely arbitrary. The fact would seem to be, that an inheritance tax is a charge upon specific property levied when a particular event takes place, namely, death of the owner. An examination of the various statutes will show two types, one type placing the charge upon the estate as a unit, the other the most common, placing the charge upon the separate shares of the beneficiaries.⁸

The federal tax of 1898⁹ was of the latter type. The New York court did not allow the deduction of this federal tax in computing the value of the property subject to its own tax, which was also in

⁴*State v. Dalrymple* (1889) 70 Md. 294, 17 Atl. 82; *Matter of Hoffman* (1894) 143 N. Y. 327, 38 N. E. 311; *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512; *Wilmerding's Estate* (1897) 117 Cal. 281, 49 Pac. 181; *Magoun v. Illinois Trust and Savings Bank* (1898) 170 U. S. 283, 18 Sup. Ct. 594; *Martin v. Pollock* (1916) 144 Ga. 605, 87 S. E. 793. It would seem that this distinction between property and succession is made only with the view of avoiding the general constitutional limitations upon direct taxation existing in this country. In England such distinction is not made. *Randolph, United States Inheritance and Transfer Taxes* 56.

⁵*United States v. Perkins* (1896) 163 U. S. 625, 16 Sup. Ct. 1073; *Gleason and Otis, Inheritance Taxation* 12.

⁶*State v. Alston, supra*; *Gelsthorpe v. Furnell* (1897) 20 Mont. 299, 51 Pac. 267; *Stixrud's Estate* (1910) 58 Wash. 339, 109 Pac. 343.

⁷Thus a New York tax upon a legacy to the United States government was sustained as a tax upon the privilege of the testator to transmit, *United States v. Perkins, supra*, evidently to avoid the seeming difficulty of a state taxing the privilege of the federal government. The statutory provision thus construed when embodied in a later New York statute was interpreted as taxing the privilege of the beneficiary to receive. See *In re Gihon* (1902) 169 N. Y. 443, 62 N. E. 561. It was held in Colorado that a legacy to the state university could not be taxed. *In re Macky's Estate* (1909) 46 Colo. 79, 102 Pac. 1075, because the tax was constructed as on the privilege to receive. The court stated that, had the tax been on the privilege of the testator to transmit, it would have been sustained.

⁸The statutes are generally not express as to whether the tax is on specific shares or on the entire estate, but it is usually easy to determine as to which class a particular statute belongs. Where rates of taxation are based upon a distinction between various classes of beneficiaries, either as to relationship or as to amounts received, the statute is clearly of the second type. See *Gleason and Otis, op. cit.* 647 et seq. for a collection of present state statutes.

⁹*Supra*, footnote 2. The rates were graduated according to the size of the interests passing and the relationship of the beneficiaries to the decedent. The Supreme Court in *Knowlton v. Moore, supra*, construed it as a tax on specific shares measured by the value of the specific shares.

effect a tax upon the specific shares of the beneficiaries, because, as the court declared the federal tax was on the privilege of the beneficiary to take.¹⁰ It was intimated that if the federal tax had been "primarily payable out of the estate" the deduction would have been allowed. The Massachusetts court reached a contrary result, allowing the deduction, under a similar law, saying that the property to be taxed should be "the property which the legatee actually would get were it not for the state tax."¹¹ The New York view was undoubtedly harsh. Nevertheless, in the absence of express statutory provision as to deductions, and since such deductions as are usually allowed are charges upon the estate as a whole, it can be seen how a court might draw a line at this point and not include such claims as are chargeable against the specific shares of the beneficiaries. The rule as announced by the Massachusetts court, however, seems to be the most natural and reasonable one to apply in the construction of inheritance tax statutes in the absence of express provision.¹²

The question assumes a different aspect under the new federal estate tax. The present tax, unlike the tax of 1898, is a direct charge upon the net estate of the decedent bearing rates graduated according to the value of that estate with no reference to beneficiaries whatsoever.¹³ As a charge upon the estate it is payable out of the *corpus* thereof as are the debts or the funeral expenses of the decedent or the ordinary administration expenses.¹⁴ Therefore it would seem that it should also be deducted by a state which taxes the specific shares of beneficiaries. To illustrate the effect of the federal estate tax if it is considered as an administration expense, suppose A, in such a state, makes a will containing a residue clause. In case the specific

¹⁰*In re Gihon, supra.*

¹¹*Hooper v. Shaw* (1900) 176 Mass. 190, 57 N. E. 361. It is stated in the opinion that the federal authorities also deducted the amount of the state tax.

¹²It is impossible to determine from the opinion just how the deductions were made. The exact amount of the "property which the legatee actually would get were it not for the state tax", can be ascertained by algebraic process only, as the amount of each tax depends upon the deduction of the other. For example, suppose a legacy of \$10,000 is subject to a federal tax of 2% and also to a state tax of 3%. The respective taxes would not be \$200 and \$300, but \$193.88 and \$294.18.

¹³Act of September 8, 1916, *supra*, § 201. "That a tax * * * , equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States." The same section then provides for percentages graduated according to the value of the net estate. Section 203 provides that the net estate should be determined by the deduction of legal claims against the estate, losses incurred during the settlement of the estate by fire, *etc.*, not compensated for by insurance, and such claims as are allowed by the laws of the jurisdiction in which the estate is being administered. In case of residents of the United States there is a further exemption of \$50,000.

¹⁴The debts of the decedent are deducted from the estate before computing its value subject to any inheritance tax. *Ross, Inheritance Taxation* § 270 *et seq.* Expenses of administration, see *Matter of Thomas* (1902) 39 Misc. 223, 79 N. Y. Supp. 571, and funeral expenses, *Matter of Maverick* (1909) 135 App. Div. 44, 119 N. Y. Supp. 914, *aff'd* 198 N. Y. 618, 92 N. E. 1084, are also deducted. For the other deductions see *Gleason and Otis, op. cit.* 294, *et seq.*

legacies and devises exhaust all of the estate except \$50,000 and the federal tax amounts to \$50,000, the federal authorities would take all of this residue. The specific legacies and devises would go untouched for purposes of federal taxation. On the other hand, the state would be deprived of its tax on the residue and could not make up the amount thereby lost by additional levies on the beneficiaries, since the state tax is on the particular interests passing. And, of course, the residuary beneficiary would take nothing under the will. In case the specific legacies and devises exhaust all of the estate, the federal tax would still have to come out of the entire estate, as a general administration expense, but the effect would be to decrease the specific interests passing. The state authorities, under the theory that a tax on an estate as a whole is an administration expense, would have to deduct the amount of the federal tax. On the other hand, in both cases the federal authorities could justify a refusal to deduct the state tax, which is on the specific shares, on the ground that the federal tax does not concern itself at all with beneficiaries' interests but only with decedents' estates.¹⁵

The theory that the new federal tax should be construed as a general administration expense was supported in the recent case of *Bell's Estate* (Pa. Dist. Ct. 1917) 75 Legal Intelligencer 113, in which the court held that, since the federal tax is a direct charge upon the estate, it should be deducted as any other legal charge thereupon in computing the state tax. On the other hand, in the case of *Matter of Bierstadt* (1917) 178 App. Div. 836, 166 N. Y. Supp. 168, the New York court held that this federal tax should not be deducted, on the grounds that, if the federal tax is on the estate, it is therefore a direct tax on property and hence unconstitutional;¹⁶ that, if it is on the transfer, it should not be deducted for the same reasons which controlled under the 1898 law.¹⁷ As a matter of legal analysis the Pennsylvania decision seems sound. However, certain consequences reached by adequate legal analysis will be rejected by courts where

¹⁵It is submitted that where the state tax is on the decedent's estate, both the federal and state taxes should be deducted in the manner suggested in footnote 12, since they both form direct charges upon the whole estate.

¹⁶The statute has nothing to fear on the ground of directness. Thus, a tax graduated according to the value of the decedent's estate was laid in the form of a stamp tax by the Act of July 1, 1862, 12 Stat. 483, c. 119. Besides, Justice White seemed to intimate in *Knowlton v. Moore*, *supra*, that a tax which comes upon the happening of an event is not direct within the meaning of the federal constitution. The tax seems more objectionable on account of its inequalities due to a failure to provide for an adjustment of burdens among beneficiaries. In this connection it is well to bear in mind the words of Justice White at p. 77: "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of property of another, and thus bring about the profound inequalities which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems." For additional objections to the constitutionality of the federal estate tax see Gleason and Otis, *op. cit.* 486 *et seq.*

¹⁷The court cited *In re Gihon*, *supra*, in support of its decision. It must be remembered that in the former case the court intimated that, had the old federal tax been payable primarily out of the estate, it would have been deducted.

they run counter to such ends as they think desirable as measured by considerations of policy. After all, the question under consideration is fundamentally this: whether a state, having exclusive power to regulate descent and distribution of property upon death, should allow a decrease of its revenues derived from the exercise of such regulation in order to lessen the burden upon the beneficiaries because of additional taxation by the federal government on the same subject matter. It is, therefore, not difficult to see the point of view of the New York court in refusing to allow a deduction of the new federal tax, nor, for that matter, the point of view of the federal treasury officials in refusing to allow a deduction of the state tax.¹⁸ Naturally, both desire to obtain as much revenue as possible from this particular field of taxation.

¹⁸Gleason and Otis, *op. cit.* 496.

RECENT DECISIONS.

BILLS AND NOTES—CHECKS—PAYMENT THROUGH CLEARING HOUSE.—A drew a check upon the defendant, payable to the plaintiff who was not a member of the clearing house. The plaintiff's correspondent presented it to the defendant for payment through the clearing house. It was included in the clearing house balance struck between the correspondent and the defendant. Before verifying the check, the defendant made a tentative entry in its balance ledger. Upon notice to stop payment, the defendant bank returned the check to the correspondent who refunded it in accordance with the clearing house rules. *Held*, since the evidence did not show an unequivocal intention to pay the check, the case should be remanded for a new trial to ascertain whether there was further evidence of such intention. *First Nat'l. Bank v. National Park Bank*. (App. Div. 1st Dept. 1917) 168 N. Y. Supp. 422.

The adjustment of a clearing house balance, as between the members, is only provisional payment of the checks included therein, *Hentz v. National City Bank* (1913) 159 App. Div. 743, 144 N. Y. Supp. 979; *Columbia-Knickerbocker Trust Co. v. Miller* (1915) 215 N. Y. 191, 109 N. E. 179; *Eastman Kodak Co. v. National Park Bank* (1916) 231 Fed. 320, since the clearing house rules generally provide for the redemption of such checks within a specified time. This general provision is an outgrowth of the practice not to examine checks until after their receipt from the clearing house. A return of such checks before the expiration of the time limit amounts to a refusal to pay them. *Tiffany, Banks & Banking* § 47. But since clearing house rules do not affect non-members, *Manufacturers' Nat'l. Bank v. Thompson* (1880) 129 Mass. 438, the question in the principal case is, therefore, whether irrespective of clearing house rules the check was paid. When a check is presented to a drawee bank for payment, any unequivocal acts showing an intention to regard it as paid will operate as payment. *Oddie v. National City Bank* (1871) 45 N. Y. 735. So marking a check paid, crediting it to the payee or his agent, and charging it to the drawer, *Consolidated Nat'l. Bank v. First Nat'l. Bank* (1908) 129 App. Div. 538; *aff'd* 199 N. Y. 516, 92 N. E. 1081, or crediting the payee with the amount upon a deposit slip, *Burns v. Yocum* (1906) 81 Ark. 127, 98 S. W. 956; *Oddie v. National City Bank*, *supra*; *contra*, *National Gold Bank v. McDonald* (1875) 51 Cal. 64, or charging the drawer and crediting the payee, *American Nat'l. Bank v. Miller* (1913) 229 U. S. 517, 33 Sup. Ct. 883, will operate as payment. So it would seem that the principal case was properly remanded for a new trial to ascertain if any final entries showing a clear intention to regard the check as paid were made on the books of the drawee before notice to stop payment was received.

BILLS AND NOTES—FORMAL REQUISITES—DESIGNATION OF A PARTICULAR FUND.—A forged bill of lading attached to the following draft on the defendant, was bought by the plaintiff. "Sixty days after sight pay to the order of ourselves 1464*l*, 9*s*, and charge the same to account of 100 R. S. M. I. bales cotton." In ignorance of the forgery, the defendant accepted and paid the draft. In a former suit to recover the money thus paid out an American court had declared that the

instrument was not a bill of exchange; *Hannay v. Guaranty Trust Co.* (C. C. 1911), 187 Fed. 686; but on appeal a new trial was ordered on the ground that the case was to be determined by English law. In the present suit brought to determine the nature of the instrument, it was *held* that New York law governed, and that under that law the instrument was a conditional order of assignment and not a negotiable instrument. *Guaranty Trust Co. of New York v. Hannay & Co.* [1918] 1 K. B. 43.

Since the essential characteristic of a negotiable bill or note is certainty in amount, the sum to be paid cannot depend on any contingency. The negotiability of a mercantile instrument is not impaired, however, by a reference therein to a fund out of which the acceptor or holder may reimburse himself, *Union Bank of Bridge-water v. Spies* (1911) 151 Iowa 178, 130 N. W. 928; *First Nat'l. Bank of Hutchinson v. Leighton* (1906) 74 Kan. 736, 88 Pac. 59, unless the fund is to be the sole source of payment, *Heflin Gold Mining Co. v. Hilton* (1899) 124 Ala. 365, 27 So. 301, when, it seems, the order to pay is conditioned either upon the existence of the fund or the amount realized therefrom. *Carlos v. Fancourt* (1794) 5 Durn. & E. 482; 1 Daniel, Neg. Inst. (6th ed.) § 50. Thus, it is submitted, the result reached in each case would depend upon the construction of the words used. See *Munger v. Shannon* (1874) 61 N. Y. 251. Where the language can be so construed as to show that the order is drawn generally upon the personal credit of the drawer, the designation of a fund will have no effect upon negotiability. *Schmittler v. Simon* (1886) 101 N. Y. 554, 5 N. E. 452; 1 Daniel, *op. cit.* § 51. Nor will the additional fact that an instrument representing the collateral fund is attached to the draft, have any effect thereon, *Barker v. Sartori* (1911) 66 Wash. 260, 119 Pac. 611; see 18 Columbia Law Rev. 167, unless the draft contains a stipulation that the collateral should be the source of payment. *Allison v. Hollembeak* (1908) 138 Iowa 479, 114 N. W. 1059. It has also been held, therefore, that the purchaser of a bill of exchange with a bill of lading attached does not become liable to an acceptor who has paid the bill, for a breach of warranty in regard to such bill of lading. *Tolerton & Stetson Co. v. Anglo-Californian Bank* (1901) 112 Iowa 706, 84 N. W. 930; Williston, Sales § 435. The court, however, in the instant case seems to have misinterpreted the American law, relying on cases, *Brill v. Tuttle* (1880) 81 N. Y. 454; *Lowery v. Steward* (1862) 25 N. Y. 539, which are clearly distinguishable on their facts; but the result reached may perhaps be justified in view of the prior adjudication as to the character of the bill in suit.

CHATTEL MORTGAGES—APPROPRIATION BY MORTGAGEE TO HIS OWN USE.—The defendant mortgaged a horse and mule to the plaintiff with a provision that the defendant should retain possession until default. On default the plaintiff was entitled to take possession, sell, and apply the proceeds to the mortgage debt. The plaintiff took possession of the horse upon default, but appropriated it to his own use. In an action for the mule by the mortgagee, the issue was the amount to be credited on the mortgage debt for the appropriation of the horse. *Held*, the value of the horse at the date of seizure should be credited on the mortgage debt. *Rentz v. Crosby* (S. C. 1918) 94 S. E. 1053.

Since in a few jurisdictions, a chattel mortgagee has only a lien, and the mortgagor's title is not divested until foreclosure, a wrongful

taking by the mortgagee will constitute a conversion. *Gould v. Armagost* (1896) 46 Neb. 897, 65 N. W. 1064; *Richter v. Buchanan* (1907) 48 Wash. 32, 92 Pac. 782. The majority rule is, however, that the mortgagee holds the legal title conditional upon payment of the mortgage debt; *Holmes v. Bell* (1849) 57 Mass. 322; *Heyland v. Badger* (1868) 35 Cal. 404; Jones, *Chattel Mortgages* (5th ed.) § 1; and upon default the absolute legal title vests in the mortgagee subject to the mortgagor's right in equity to redeem, Jones, *op. cit.* § 699, or to compel an accounting after a sale of the property. *Reese v. Lyon* (1883) 20 S. C. 17. Moreover, since the mortgagee may take possession on default, Jones, *op. cit.* § 705, he cannot convert the property after taking such possession in a jurisdiction where he has legal title, *Burdick v. McVanner* (N. Y. 1846) 2 Denio 170; *Holmes v. Bell*, *supra*, as the court intimated in the principal case. Yet some courts regard an improper sale by the mortgagee, after default, as a conversion. *Kellogg v. Malick* (1905) 125 Wis. 239, 103 N. W. 1116. Such conversion discharges the mortgage debt to the value of the property when possession is taken. *Hartman v. Ringenberg* (1889) 119 Ind. 72, 21 N. E. 464; see *Powell v. Gagnon* (1893) 52 Minn. 232, 53 N. E. 1148. If the mortgagee who takes possession after default retains possession and appropriates the property to his own use the mortgage debt is deemed satisfied to the value of the property when possession is taken, *In re Haake* (1872) 11 Fed. Cas. No. 5,883; see *Priddy v. Miners', etc., Bank* (1908) 132 Mo. App. 279, 111 S. W. 865. Therefore, the result reached in the principal case is the same whether the retention of possession and the appropriation of the property to his own use by the mortgagee amounted to a conversion or not.

CONFLICT OF LAWS—CONTRACTUAL CAPACITY—STATE POLICY.—The defendant, a married woman domiciled in Texas, executed a guaranty while in Illinois, where the contract was valid. Action was brought against her on the guaranty in Texas, where married women had no capacity to make such contracts. *Held*, there could be no recovery since the public policy of Texas would be contravened by the enforcement of the contract. *Union Trust Co. v. Grosman* (1918) 38 Sup. Ct. 147.

The validity of a contract is ordinarily determined by the law of the place where it was made. *Berger-Crittenden Co. v. Chicago, etc., Ry.* (1915) 159 Wis. 256, 150 N. W. 496; Story, *Conflict of Laws* (8th ed.) § 242. A contract valid where made will be enforced in any jurisdiction, unless the positive law of the forum, or a public policy which regards such contracts as immoral or pernicious, and their recognition as inexpedient, would be contravened. *Pope v. Hanke* (1894) 153 Ill. 617, 40 N. E. 839; *Fox v. Postal, etc., Co.* (1909) 138 Wis. 648, 120 N. W. 399; see *Palmer v. Palmer* (1903) 26 Utah 31, 72 Pac. 3; Story, *op. cit.* § 244. The fact that the contract could not validly have been made in the forum is not of itself generally held to indicate a local policy opposed to its enforcement. *Brown v. Browning* (1886) 15 R. I. 422, 7 Atl. 403; *The Fri* (C. C. A. 1907) 154 Fed. 333. When contracts made by married women in a jurisdiction where they possess capacity, are sought to be enforced in the state of their domicil, many courts hold, accordingly, that their inability to assume the obligation in the forum evinces no policy forbidding its enforcement if validly contracted elsewhere, and have regarded the legislative tend-

ency to remove the disabilities of coverture as an indication that such enforcement is neither pernicious nor impolitic. *Thompson v. Taylor* (1901) 66 N. J. L. 253, 49 Atl. 544; *Bowles v. Field* (C. C. A. 1897) 78 Fed. 742; *International Harvester Co. v. McAdam* (1910) 142 Wis. 114, 124 N. W. 1042. The principal case adopts a contrary rule holding that the inability of a married woman so to contract created by a statute of her domicile evidences a policy, where the domicile and the forum are the same state, opposed to charging her estate with the obligation. *Cf. Armstrong v. Best* (1893) 112 N. C. 59, 17 S. E. 14. The decision is less in accord with the general principles regulating the enforcement of foreign contracts than is *Thompson v. Taylor, supra*, and it would appear unfortunate that the Supreme Court should have adopted it in determining the Texas law in this regard, particularly since the Texas courts do not seem to have passed upon this point of policy.

CONSTITUTIONAL LAW—AWARD BY CONGRESS—VALIDITY OF STATUTE REGULATING ATTORNEY'S FEES—The plaintiff was an attorney who had prosecuted a claim, upon a contingent fee of 50%, against the United States for the value of property taken by military forces during the Civil War. An Act of Congress, recognizing the claim and one similar to it, was passed, which prohibited attorneys from receiving a fee greater than 20% of the amount awarded. In a suit to test the validity of the act, *held*, one judge dissenting, that it was unconstitutional. *Newman v. Moyers* (D. C. App. 1917) 50 Chicago Legal News 217.

Since the United States cannot be sued without its consent, the payment of a claim against it depends entirely upon its voluntary action and cannot be demanded as a matter of legal right. See *United States v. Clarke* (1834) 33 U. S. 436, 444; *United States v. Lee* (1882) 106 U. S. 196, 1 Sup. Ct. 240. Consequently, an award recognizing the validity of a claim must be accepted subject to the terms and conditions imposed thereon, *Ralston v. Dunaway* (1916) 123 Ark. 12, 184 S. W. 425; *Ball v. Halsell* (1896) 161 U. S. 72, 16 Sup. Ct. 554, in the same manner as a gratuity or bounty of the government. *Frisbie v. United States* (1895) 157 U. S. 160, 15 Sup. Ct., 586; *United States v. Hall* (1878) 98 U. S. 343, 351. The imposition of a condition restricting the amount of compensation which an attorney may receive for prosecuting a claim is a constitutional exercise of congressional power. *Ball v. Halsell, supra*. Though contracts for contingent fees, dependent upon the recovery of the claim, have been upheld as legal, *Nutt v. Knut* (1906) 200 U. S. 12, 26 Sup. Ct. 216; *Taylor v. Bemiss* (1884) 110 U. S. 42, 3 Sup. Ct. 441, yet, as against the fund recovered, they are subject to the conditions imposed upon the award. *Ralston v. Dunaway, supra*. But a different result has been reached where the question involved was whether an attorney could recover on his contract out of other property possessed by his client. *Davis v. Commonwealth* (1895) 164 Mass. 241, 41 N. E. 292; *Moyers v. Fahey* (Distr. Col. 1915) 43 Wash. L. R. 691. The holding in the instant case would, therefore, seem to be erroneous in so far as it permitted the attorney to maintain a lien upon the fund appropriated beyond the amount which Congress allowed him.

CONSTITUTIONAL LAW—STATE TAXATION AFFECTING INTERSTATE COMMERCE—The state of Pennsylvania imposed an annual mercantile license tax upon each wholesale and retail vender of goods, "one-half

mill additional on each dollar of the whole volume, gross, of business transacted annually." The plaintiff sold and delivered at wholesale from a warehouse located in the state, merchandise to purchasers within the state and to customers in foreign countries. The bulk of the sales was to purchasers without the state. In an action to determine the validity of the tax, it was held that the tax was unconstitutional. *Crew Levick Co. v. Commonwealth of Pennsylvania* (1917) 245 U. S. 292, 38 Sup. Ct. 126.

Merchants and others doing a local business are subject to an occupation tax of a specific and reasonable amount, even though a considerable part of the business done is interstate commerce. *Kehrer v. Stewart* (1905) 197 U. S. 60, 25 Sup. Ct. 403; *Postal Telegraph Co. v. City of Portland* (D. C. 1915) 228 Fed 254. The Supreme Court has, however, gone further in *Ficklen v. Shelby County Taxing District* (1892) 145 U. S. 1, 12 Sup. Ct. 810 which permitted a state to require as a condition for a license to do general brokerage business, the payment of a fee measured by the receipts from interstate as well as from local business. Where, however, a tax, whether it be called an occupation tax or not, is measured by gross receipts from all business, an element similar to the one which has perplexed the court in determining the validity of taxation of foreign corporations for the privilege of doing local business, would seem to be involved. Cf. *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190; see 18 Columbia Law Rev. 168. If the business taxed includes interstate commerce, a tax on the gross receipts thereof would seem to affect directly the flow of goods to and from other states, since it is obvious that the greater the exporting of goods, the greater would the tax become. It is difficult, however, to distinguish the instant case from the *Ficklen* case. The distinction drawn by the court in the principal case to the effect that the tax was not an occupation tax except as it was levied on the very carrying on of the business of exporting merchandise, is not very potent, since the "exception" is equally applicable to the *Ficklen* case, which therefore seems to be practically and rightly overruled. See *Galveston, etc., Ry. v. Texas* (1908) 210 U. S. 217, 28 Sup. Ct. 638; 31 Harvard Law Rev. 721, 762 n. 156. Though the Supreme Court has permitted taxes on property to be measured by receipts which are in part from interstate commerce, *Adams Express Co. v. Ohio* (1897) 165 U. S. 194, 17 Sup. Ct. 604, it has declared invalid a tax on railroads "equal to" a percentage of the gross receipts. *Galveston, etc., Ry. v. Texas, supra*. The tendency, therefore, would seem to be to permit states to take account of interstate business once only in the levying of their taxes, and to uphold such taxes when they are laid upon the property, tangible or intangible, within a state, since such taxes appear, at least in so far as their nomenclature is concerned, to affect interstate commerce the least. *Cudahy Packing Co. v. Minnesota* (U. S. Sup. Ct. Oct. Term 1917, No. 32).

CORPORATIONS—CONTESTED ELECTION OF DIRECTORS—REMEDY.—Plaintiffs filed a bill in equity to try the validity of the corporate election of directors, claiming that the election of the defendants, who were acting as directors, was invalid. A statute provided that *quo warranto* could be brought against any person wrongfully exercising a franchise. Held, three judges dissenting, that the plaintiffs had an adequate remedy at law by *quo warranto* under the statute, and therefore no relief in equity would be granted. *Grant v. Elder* (Colo. 1917) 170 Pac. 198.

Quo warranto, either in the earlier form of a writ or in the later form of an information, lay at common law to test the validity of the exercise of a franchise. High, Extraordinary Legal Remedies, (3rd ed.) §§ 592 *et seq.* Its application to test the validity of an election to office in a private corporation has been denied, *Queen v. Mousley* (1846) 8 Q. B. 946, even under a statute similar to the one in the instant case, on the ground that such an office is not a public office. See *Gilchrist v. Collopy* (1904) 119 Ky. 110, 82 S. W. 1018. In most jurisdictions, however, it has been held to be a proper remedy in such cases, *State ex rel. Dunlap v. Stewart* (1881) 11 Del. 359; *Commonwealth v. Graham* (1870) 64 Pa. 339; *Armstrong v. State ex rel. Edwards* (1884) 95 Ind. 421, and it would seem that a statute such as the one in the instant case should apply, *Owen v. Whitaker* (1869) 20 N. J. Eq. 122, since, by exercising the powers given the corporation by franchise, the directors illegally elected were wrongfully exercising a franchise. Where *quo warranto* may be brought, relief in equity has been denied, *Deal v. Miller* (1914) 245 Pa. 1, 90 Atl. 1070, on the ground that there existed an adequate remedy at law. *McCarthy v. McKinney* (1911) 137 Ga. 292, 73 S. E. 394; *Owen v. Whitaker, supra.* Equity, however, may enjoin the holding of a corporate election, *Way v. American Grease Co.* (1900) 60 N. J. Eq. 263, 47 Atl. 44; 2 Cook, Corporations (6th ed.) §§ 616, 618, and, when equity has jurisdiction on other grounds, it may decide the validity of an election already held. *Chicago Macaroni Co. v. Boggiano* (1903) 202 Ill. 312, 67 N. E. 17. The cumbersome nature of the proceeding in *quo warranto*, which has led to the enactment of statutes conferring upon the courts equity jurisdiction in the matter of corporate elections, see *Matter of Ringler and Co.* (1912) 204 N. Y. 30, 40, 97 N. E. 593; 2 Cook, *op. cit.* § 619, might afford a ground on which equity could take jurisdiction in cases such as the instant one.

COURTS—NUNC PRO TUNC CORRECTIONS—CRIMINAL CASES.—The petitioner, convicted of murder, sought discharge from custody by a writ of habeas corpus, relying on a statute relating to unwarranted delay in the conduct of criminal prosecutions. After the term at which judgment had been rendered granting the writ of habeas corpus, the court amended the record by a *nunc pro tunc* order, inserting a memorandum of proceedings inadvertently omitted by the clerk, which made the statute inapplicable. *Held*, that the court had power so to amend the record, after giving the prisoner notice and an opportunity to be heard, and that the writ should be denied. *Ex parte Coon* (W. Va. 1918) 94 S. E. 957.

In civil cases, a court may upon proper evidence amend the record at any time by *nunc pro tunc* orders, so as to make it disclose what had actually been done. *Clifford v. City of Martinsburg* (1916) 78 W. Va. 287, 88 S. E. 845; *Chester v. Graves* (1914) 159 Ky. 244, 166 S. W. 998. The extent to which the power may be exercised in criminal cases is not so well established. Since the immediate execution of criminal sentences is deemed expedient, it has been held that the record of judgments may not be amended to insert an additional penalty after the sentence as recorded has been fully served. *Smith v. District Court of Mahaska County* (1906) 132 Iowa 603, 109 N. W. 1085. The power of the court to amend the record has apparently not been otherwise restricted. Thus, mere

formal or clerical errors in the entries of the clerk may be corrected by *nunc pro tunc* orders. *Knefel v. People* (1900) 187 Ill. 212, 58 N. E. 388. Omissions as to ordinary procedural matters may also be supplied, to show, for instance, the return of an indictment, see *May v. People* (1879) 92 Ill. 343, the entry of a plea of not guilty, see *State v. Gibson* (1910) 67 W. Va. 548, 68 S. E. 295, the fact that judgment and sentence were duly rendered, *State v. Gordon* (1906) 196 Mo. 185, 95 S. W. 420, and that the accused waived a jury trial, and was committed to jail in default of paying a fine. See *In re McQuown* (1907) 19 Okla. 347, 91 Pac. 689. In the principal case, the clerk omitted to record interlocutory motions for a continuance, made by the accused. The matter omitted was purely procedural, and its insertion imposed no additional penalty on the petitioner. The court acted fully within its powers in ordering the correction to be made.

EVIDENCE—PRESUMPTION OF DEATH—UNEXPLAINED ABSENCE.—In a proceeding to assess a transfer tax on the estate of one A who died in 1915, it was found that his brother had disappeared in 1894 and could not be traced. *Held*, since there is a presumption that one who has not been heard of for seven years is dead at the end of that time, the brother will be presumed to have died before A. *In re Rowe* (Surr. Ct. 1918) 58 N. Y. L. J. 1961.

It is well settled that a presumption of death will arise after an unaccounted absence of seven years. 2 Chamberlayne, Evidence §§ 1093, 1094, but the decisions are conflicting as to the existence of any presumption of the time of death. A number of American jurisdictions hold, in accordance with several English cases, now overruled, that, as there is a presumption of life till rebutted by the presumption of death, death must be presumed to have occurred at the end of the seventh year. *Donovan v. Major* (1911) 253 Ill. 179, 97 N. E. 231; *Baker v. Fidelity Title & Trust Co.* (1913) 55 Pa. Super. Ct. 15; *In re Benham* (1868) L. R. 4 Eq. 416. Admittedly, however, it is most unlikely that death occurred at that time, and it would appear that a presumption of life must cease some time before a presumption of death arises. 9 Columbia Law Rev. 435; 3 Virginia Law Rev. 451. The sounder view, now held in England and in many American jurisdictions, is that the only presumption as to the time of death is that it occurred sometime during the seven year period. *In re Phelne's Trusts* (1870) 5 Ch. App. *139; *Davie v. Briggs* (1878) 97 U. S. 628; see *Spahr v. Mutual Life Ins. Co.* (1906) 98 Minn. 471, 108 N. W. 4. It was unnecessary for the court in the principal case to decide whether there was a presumption of death at a particular time within the first seven years of disappearance since the absentee disappeared more than seven years before the death of his brother, and the court carefully refrained from expressing any opinion on that point. It was soundly held, however, that the absentee would be presumed to be dead at the end of the seven years and, therefore, to have died before his brother A. *Matter of Benjamin* (1913) 155 App. Div. 233, 131 N. Y. Supp. 1091, *accord*.

INSURANCE—"ACCIDENT"—PROBABLE RESULT OF ORDINARY ACTS.—The deceased, insured against death or injury by "violent, external and accidental means", having a boil on his neck, rubbed it with his soiled hands to relieve an irritation, and thereby broke the scab, permitting germs of erysipelas to enter. The jury found that death resulted from

accidental means. *Held*, on appeal, there was no evidence sufficient to go to the jury that the insured's death resulted from accidental means. *Maryland Casualty Co. v. Spitz* (C. C. A. 1917) 246 Fed. 817.

The courts generally define an accident as an event which takes place without the foresight or expectation of the person acted upon or affected thereby. See *Railway, etc., Ass'n. v. Drummond* (1898) 56 Neb. 235, 76 N. W. 562. Mere negligence on the part of the insured which contributed to the accident will not defeat his right to recover. *Schneider v. Provident Life Ins. Co.* (1869) 24 Wis. 28. Even a policy exempting the insurer from liability when the injury is caused by a "voluntary exposure to unnecessary danger" will not bar a recovery unless the insured intentionally and consciously assumed the risk of an obvious danger. *Lehman v. Great Eastern Casualty Co.* (1896) 7 App. Div. 424, 39 N. Y. Supp. 912, aff'd. (1899) 158 N. Y. 689, 53 N. E. 1127. The courts, however, also hold that an effect which is the natural result of an act voluntarily undertaken is not accidental. *Feder v. Iowa State, etc., Ass'n* (1899) 107 Iowa 538, 78 N. W. 252. But, it seems that this doctrine should be limited to cases where the act and result are so intimately connected that one could not have voluntarily done the act without necessarily having intended the result. Whether the case at hand is correctly decided appears to depend on whether the breaking of the scab was an unexpected result to which the insured's negligence contributed, or whether it was the probable and ordinary effect of an act voluntarily undertaken. The court held that by scratching his neck the deceased must have intended the ordinary result of breaking the scab. However, it appears more reasonable to suppose that he merely intended to relieve the temporary irritation, and that in so doing he negligently broke the scab. This interpretation would throw the case into that class where the insured's negligence which contributed to an accident will not bar his right to recover. See *Schneider v. Provident Life Ins. Co., supra*. Whether or not we come to this conclusion the court was clearly wrong in holding that there was not sufficient evidence of an accident to go to the jury. See *United States Mut. Accident Ass'n. v. Barry* (1888) 131 U. S. 100, 9 Sup. Ct. 755. If we conclude that breaking the scab was an accident, death resulting from germs entering the wound must also be considered accidental. *Farner v. Massachusetts Mut. Accidental Ass'n.* (1907) 219 Pa. 71, 67 Atl. 927.

INSURANCE—FIRE—LOSS BY EXPLOSION ON NEIGHBORING PREMISES.—The plaintiff's barge was insured against loss by fire. A conflagration broke out on neighboring premises, where dynamite was stored, and the resulting explosion injured the barge. The policy contained no exception for loss by explosion. *Held*, the insurance company was liable for the loss. *Bird v. St. Paul Fire Insurance Co.* (App. Div. 1917) 167 N. Y. Supp. 707.

Loss caused by explosion, resulting from the sudden and rapid combustion of explosive substances, is covered by an insurance policy against fire, *German, etc., Ass'n. v. Conner*, (Ind. 1917) 115 N. E. 804; Richards, *Insurance* (3rd ed.) § 231, unless there is, as in the standard fire insurance policy, a clause exempting the insurer from liability for loss by explosion. But even under the standard policy, if the explosion, *i. e.*, the combustion of the explosive substance, is caused by a hostile fire on the insured premises, the insurance company is liable for the resulting loss, as the original hostile fire

is said to be the proximate cause of the loss. *Fire Ass'n. of Phila. v. Evansville Brewing Ass'n.* (Fla. 1917) 75 So. 196; *Wheeler v. Phenix Ins. Co.* (1911) 203 N. Y. 283, 96 N. E. 452. The courts refuse, however, to hold the insurer under the standard policy, if the hostile fire and the resulting explosion both occur upon neighboring premises, and the loss is caused entirely by concussion, on the ground that the fire is too remotely connected with the loss. *Hustace v. Phenix Ins. Co.* (1903) 175 N. Y. 292, 67 N. E. 592; *Hall & Hawkins v. National Fire Ins. Co.* (1906) 115 Tenn. 513, 92 S. W. 402; *Phenix Ins. Co. v. Adams* (Ky. 1910) 127 S. W. 1008; but see *Heuer v. Northwestern Nat'l. Ins. Co.* (1893) 144 Ill. 393, 33 N. E. 411. These decisions are not controlling, however, where, as in the principal case, the policy does not contain any exception for loss by explosion, for in such a case the explosion itself is deemed to be insured against, and the company is therefore liable for the resulting loss. *German, etc., Ass'n. v. Conner, supra.* In general, the fact that the fire causing the loss occurred on neighboring premises does not bar recovery against the insurer, for damage upon the insured premises, resulting from the fire. *Russell v. German Fire Ins. Co.* (1907) 100 Minn. 528, 111 N. W. 400; May, Insurance, § 402 n (a). It is difficult to see why the courts should draw a distinction between loss due to an explosion, and loss due to other causes, following a fire on neighboring premises; and it would be more logical to hold the insurer liable in both cases. But cf. *Caballero v. Home Mutual Ins. Co.* (1860) 15 La. Ann. 217.

JURY—PERSONATION BY DISQUALIFIED PERSON—NEW TRIAL.—T was summoned for jury service, but did not attend, and C, a disqualified person not on the jury list, answered to T's name and sat in his place on the jury which convicted the defendant. The mistake was discovered after verdict. *Held*, that there had been a mistrial. *Rex v. Wakefield* (1918) 13 Crim. App. Cas. 56.

Statutory disqualification of a juror, first discovered after verdict, is not, *per se*, sufficient ground for a new trial. *State v. Jones* (1912) 90 S. C. 290, 73 S. E. 177; *Teel v. State* (Ark. 1917) 195 S. W. 32. Some courts will grant a new trial if the defendant could not have discovered the disqualification by proper inquiry before verdict. *Smith v. State* (1907) 2 Ga. App. 574, 59 S. E. 311, while others even then would deny a new trial, in their discretion, unless substantial prejudice to the defendant were proved. See *Commonwealth v. Wong Chung* (1904) 186 Mass. 231, 71 N. E. 292; *People v. Cosmo* (1912) 205 N. Y. 91, 98 N. E. 408. It would appear that by the juror's assumption of another's name, as in the principal case, the defendant is prevented from discovering his disqualification by due inquiry, and so, under the holding of *Smith v. State, supra*, should be granted a new trial. But even though the personating juror were qualified, it would seem that the decision in the principal case would be the same. Where there is misnomer of a qualified juror it is held that discovery of the fact after verdict will not cause the court to grant a new trial, *Commonwealth v. Potts* (1913) 241 Pa. 325, 88 Atl. 483; *Chadwick v. United States* (C. C. A. 1905) 141 Fed. 225, since the defendant is not prejudiced. *Louisville Ry. v. Smock* (1914) 157 Ky. 11, 162 S. W. 546. Courts have similarly refused a new trial where one juror personated another, *Case of a Juryman* (1783) 12 East 231, again asserting that the defendant was not prejudiced, *Commonwealth v. Parsons* (1885) 139 Mass. 381, 31 N. E. 767, and it has

even been held, in a case like the instant one, where the personating juror was neither summoned nor qualified, that it was too late to seek a new trial after verdict. *Tolbert v. State* (1893) 71 Miss. 179, 14 So. 462. These cases seem to lose sight of the fact that a juror, by assuming another's name, may escape personal investigation and thus cause the defendant to lose the vital right of peremptory challenge. See *Regina v. Mellor* (1858) 1 Dears. & B. 468. The court, for this reason, would seem to be right in granting a new trial in the principal case. *King v. Tremearne* (1826) 5 B. & C. 254; *Norman v. Beaumont* (1744) Willis 484; *Regina v. Mellor*, *supra*, *contra*, *Tolbert v. State*, *supra*.

MUNICIPAL CORPORATIONS—IMPLIED POWERS OF MUNICIPALITY TO OWN PUBLIC UTILITIES—ICE AND COLD STORAGE PLANT.—A town charter gave power to issue bonds whenever the Board of Aldermen should "deem it proper and expedient so to do for the purpose of making any public improvement" (Ga. Laws 1905, p. 609, § 6). *Held*, the town may issue bonds for the erection of a municipal ice and cold storage plant for the benefit of its inhabitants. *Saunders v. Mayor, etc., of Town of Arlington* (Ga. 1918) 94 S. E. 1022.

However illogical its origin may be, the doctrine is well settled that taxes may be levied for public purposes only. *McBain*, Taxation for Private Purpose, 29 Pol. Sci. Quar. 185. But expenditures for even unusual public utilities, such as municipal fuel yards, have now come to be considered constitutional, *Laughlin v. City of Portland* (1914) 111 Me. 486, 90 Atl. 318; *cf. Stevenson v. Port of Portland* (1917) 82 Ore. 576, 162 Pac. 509; *Opinion of Justices* (1903) 182 Mass. 605, 66 N. E. 25, and the Georgia court, some time before the decision in the instant case, permitted the construction of a municipal ice plant. *Holton v. City of Camilla* (1910) 134 Ga. 560, 68 S. E. 472; *contra, Union Ice & Coal Co. v. Town of Ruston* (1914) 135 La. 898, 66 So. 262. Moreover, the Supreme Court will accept the state decision as to the public need and purpose, unless it is clearly unreasonable. *Jones v. City of Portland* (1917) 38 Sup. Ct. 112. However, in the above cases express statutory authority had been given the municipalities to enter these novel fields. In the absence of express charter provisions, general welfare clauses, *Intendant, etc., of Livingston v. Pippin* (1858) 31 Ala. 542; *contra, Town of Jacksonport v. Watson* (1878) 33 Ark. 704, or general taxing power clauses, *Mayor, etc., of Rome v. Cabot* (1859) 28 Ga. 50; *Fawcett v. Mt. Airy* (1903) 134 N. C. 125, 45 S. E. 1029, are construed to grant to the municipality the right to operate customary public utilities, such as lighting plants and water works. And in one instance the court reached this result without reference to any charter provision. *Ellinwood v. The City of Reedsburg* (1895) 91 Wis. 131, 64 N. W. 885. But such expense may not be incurred in the case of an unusual public utility, as an abattoir. *Huesing v. City of Rock Island* (1889) 128 Ill. 465, 21 N. E. 558. In extending the rule for construing general or implied powers so as to include the power to own and operate unusual public utilities, the instant case aids in whittling down the distinction between public and private business and in broadening the field of municipal ownership and control over living costs. See *McBain*, American City Progress and the Law, 44-48, 193-202; 52 American Law Rev. 215; *cf. 15 Columbia Law Rev.* 179, 181; Pond, Public Utilities, Chapters IV-V.

PRINCIPAL AND AGENT—RIGHT OF UNDISCLOSED PRINCIPAL TO SUE—PAROL EVIDENCE RULE.—Without disclosing that he was acting on behalf of the plaintiff, L., an authorized agent, entered into a written contract in which he described himself as "the character". In an action on the contract by the plaintiff against the defendant, the other party to the contract, *held*, that parol evidence was admissible to establish the plaintiff's right to sue. *Rederi Aktienbolaget Trans-Atlantic v. Fred Drughorn Ltd.* (1918) 144 L. T. 273, 306.

An undisclosed principal may introduce parol evidence to enable him to maintain an action upon a simple contract made for his benefit by an authorized agent, *Ballard v. Friedeberg* (1917) 177 App. Div. 715, 164 N. Y. Supp. 912, even though the defendant at the time he entered into the contract was in ignorance of the agency. *Darrow v. H. R. Horne Produce Co.* (C. C. 1893) 57 Fed. 463; *cf. Kelly A. B. Co. v. Barber A. P. Co.* (1914) 211 N. Y. 68, 105 N. E. 88. However, an undisclosed principal has no right to sue if the defendant was induced to enter into the contract due to personal trust reposed in the agent. *Winchester v. Howard* (1867) 97 Mass. 303; *cf. Crowder v. Yovovich* (1917) 84 Ore. 41, 164 Pac. 576. In *Humble v. Hunter* (1848) 12 Q. B. 310, it was held that the mere fact that the agent described himself as the owner in a charter-party was sufficient to prevent the undisclosed principal from bringing suit, though there was nothing to show that the contract was personal. If that case is based fundamentally upon the theory that trust was reposed in the agent, it is weak upon its facts. 2. *Meechem, Agency* (2nd ed.) § 2070, n. 54, and has not been followed in analogous situations. *Hawkins v. Windhorst* (1912) 87 Kan. 176, 102 Pac. 761; but *cf. New York Brokerage Co. v. Wharton* (1909) 143 Iowa 61, 119 N. W. 969. On the other hand, if the case rests upon the theory that parol evidence to show the existence of an undisclosed principal cannot be introduced to vary the terms of a written instrument, it is submitted that the case rests upon a narrow distinction from the cases in which the agent contracts as principal without describing himself as such. *Cf. Tiffany, Agency* § 50. Considering the case in reference to the parol evidence rule, its effect seems to be that where the terms of the written instrument exclude the idea of agency, the undisclosed principal cannot bring suit. Though *Humble v. Hunter, supra*, is law, see *Formby Bros. v. Formby*, (1910) 102 L. T. R. (N. S.) 116, the courts have shown no tendency to apply it broadly, *cf. Abbott v. Atlantic Refining Co.* (1902) 4 Ont. L. R. 701; *Childs v. Gilis Construction Co.* (1912) 42 Utah 120, 129 Pac. 356, but on the contrary allow an undisclosed principal to bring an action even where the terms of the written instrument afford a substantial basis for inferring that trust was reposed in the agent. *Pritchard v. Budd* (C. C. A. 1896) 76 Fed. 710. It would seem, therefore, that even though a distinction drawn between the facts of *Humble v. Hunter, supra*, and those of the principal case be viewed as meticulous, the latter decision is to be supported.

PRINCIPAL AND AGENT—LIABILITY OF AGENT FOR FRAUD OF SUB-AGENT.—The plaintiff consigned cotton to the defendant for sale. The defendant had it delivered to a Muccadam, or warehouseman, upon whom they had agreed, whose duties were to store the cotton and close sales upon the terms fixed by the defendant. The Muccadam was to be compensated in the first instance by the defendant who was to be reimbursed by the plaintiff. The Muccadam fraudulently sold the

cotton and appropriated the proceeds. *Held*, the defendant was liable to the plaintiff for the fraudulent appropriations. *Nensukhdas v. Birdichand* (1917) 19 Bombay L. R. 948.

A factor or other agent employed because of his skill and discretion must perform all acts involving these qualities personally, in the absence of a contrary understanding. See *Warren v. Martin* (1850) 52 U. S. 209; *Smith v. Jefferson Bank* (1906) 120 Mo. App. 527, 97 S. W. 247. He may, however, be given authority to hire another agent for the principal to co-operate with him in the performance of these acts, *Huffcut Agency*, (2nd ed.) § 95, in which case he is under no liability for the acts of the additional agent. *Morris v. Warlick* (1903) 118 Ga. 421, 45 S. E. 407. He may, on the other hand, have only procured the consent of the principal to his hiring another to perform, as his agent, the acts which he otherwise would have had to perform personally. In this case he is liable to the principal for any default by his own agent. *Barnard v. Coffin* (1886) 141 Mass. 37, 6 N. E. 364; *Bank of Ky. v. Adams Express Co.* (1876) 93 U. S. 174. The law on this subject is fairly well settled, but, as the parties seldom define clearly the relations which they intend to create, a difficult question of fact is often presented. Although the additional agent is hired in the original agent's name, the principal may be in the position of an undisclosed principal to the additional agent, if the employment is in his behalf. *Whitlock v. Hichs* (1874) 75 Ill. 460; see *Blackburn v. Mason* (1893) 68 L. T. R. (N. S.) 510. Roughly, this would seem to be the case if he is to receive the benefits, furnish the consideration, and have the control. In the principal case the plaintiff was, ultimately, to furnish the consideration, and, as the defendant was under no obligation to perform the services of the Muccadam, the contract was for his benefit. It is true that the defendant was to have the immediate control but it would seem that the plaintiff was the real principal of the additional agent. *Cf. De Bussche v. Alt* (1873) 8 Ch. D. 286; *McCants v. Wells* (1873) 4 S. C. 381. The court thought otherwise, however, and properly applied the law to its interpretation of the facts.

SPECIFIC PERFORMANCE—CONTRACT TO LEND MONEY ON INSURANCE POLICY.—A life insurance policy was issued which contained the provision that the insurer would lend money thereon to the "insured or owner of the policy". The plaintiff was an assignee who sought to borrow on it. *Held*, that specific performance of the contract to lend would be granted. *Caplin v. Penn Mutual Life Ins. Co.* (App. Div. 2nd Dept. 1918) 58 N. Y. L. J. 1987.

Ordinarily, specific performance will not be decreed of an agreement to borrow, *Rogers v. Challis* (1859) 27 Beav. 175, or to lend money. *Bradford, etc., R. R. v. New York, etc., R. R.* (1890) 123 N. Y. 316, 25 N. E. 499; *Sichel v. Mosenthal* (1862) 30 Beav. 371; *South African Territories Ltd. v. Wallington* [1898] A. C. 309. The reason for its refusal lies in the fact that the remedy at law is adequate, *Sichel v. Mosenthal, supra*, since the damages arising from breach of a contract to borrow or to lend are easily assessable, being, in the absence of special damages, the difference between the contract rate and the market rate of interest, plus the expenses incurred in procuring a new loan. 18 Columbia Law. Rev. 170. The inability to secure a loan elsewhere upon the breach of a contract to lend will not furnish a basis for

equitable relief. Though the remedy at law is obviously inadequate, yet it is so because the borrower has no credit. To compel the lender to advance money under such circumstances would be a hardship. The rules of equity, however, are not inflexible; and where circumstances exist which make it impossible to secure an adequate remedy at law, equity, in its discretion, may exercise jurisdiction. The contract to lend is an intimate part of the contract of insurance and, consequently, damages at law for the breach of the contract to lend would be difficult to ascertain. Furthermore, since the company is amply protected by the policy in making the loan, the objection of hardship does not apply. Finally, a loan on such security could not readily be obtained elsewhere. *Cf. Holt v. United Security, etc., Co.* (1909) 76 N. J. L. 585, 72 Atl. 301. Accordingly, it would seem that the facts of the principal case justified the court in granting specific performance.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE.—The plaintiffs and the defendant agreed orally that each would convey land to a city for the purpose of establishing a road. The plaintiffs conveyed but the defendant refused to do so. *Held*, that the plaintiffs were entitled to specific performance of the agreement. *Brower v. Walker* (Iowa 1918) 166 N. W. 269.

By an Iowa statute an oral contract for the conveyance of land is taken out of the operation of the Statute of Frauds if the purchase money, or any part thereof, has been received by the vendor. Iowa Code, 1897, § 4626. The courts have interpreted "purchase money" to mean any consideration, see *Devin v. Himer* (1870) 29 Iowa 297, and so, where the consideration performed by the vendee for the vendor's oral promise to convey was the conveyance of other land to the vendor, *Devin v. Himer, supra*, or allowing the vendor to name a child, *Daily v. Minnick* (1902) 117 Iowa 563, 91 N. W. 913, specific performance of the contract was decreed. Under this interpretation of the Iowa Code the principal case is clearly correct. Moreover, it would seem that the decision would have been the same without the statute. It is well settled that the Statute of Frauds will not prevent equity enforcing an oral contract to convey land where the vendee has entered upon, see *Pledger v. Garrison* (1883) 42 Ark. 246, or entered upon and improved, *Magee v. Magee* (1917) 174 Cal. 276, 162 Pac. 1023, the premises, or, again, where he has rendered services, *Williams v. Williams* (1917) 128 Ark. 1, 193 S. W. 82; *cf. Redford v. Lloyd* (Ga. 1917) 93 S. E. 296, or has done acts, in performance of the contract, of such character that restoration or compensation would be impossible *Slingerland v. Slingerland* (1888) 39 Minn. 197, 39 N. W. 146. Thus, in *McKinley v. Hessen* (1911) 202 N. Y. 24, 95 N. E. 32, where the purchase price was paid under the contract to a third party and could not be recovered, the court granted specific performance. In the principal case as the plaintiff could not have recovered the land conveyed to the municipality, and as the damage suffered by the conveyance of his land was incapable of computation, specific performance could have been decreed, it seems, independently of the statute.

STATES—RIVER BOUNDARY—AVULSION AND ACCRETION.—From 1823 to 1876, by a gradual process of erosion and accretion, the Mississippi River, separating Arkansas and Tennessee, added soil from the Ten-

nessee shore to that of Arkansas. In 1876 a sudden and violent change resulted in the cutting of a new channel, so that land once on the east bank was now on the west. *Held*, that the boundary line remained in the middle of the old channel and that Tennessee did not regain the land lost by erosion. *Arkansas v. Tennessee* (1918) 38 Sup. Ct. 300.

It is a well settled principle of international law that where a navigable river is the boundary of conterminous states, the middle of the channel is presumptively the line of separation, Wheaton, Elements of International Law (8th ed.) § 192, and our courts have generally accepted this view, *Iowa v. Illinois* (1906) 202 U. S. 59, 26 Sup. Ct. 571; *Franzini v. Layland* (1903) 120 Wis. 72, 97 N. W. 499; *contra*, *State v. Muncie Pulp Co.* (1907) 119 Tenn. 47, 104 S. W. 437; *Hearne v. State* (1915) 121 Ark. 286, 153 S. W. 262, except where treaty stipulations intervene, *De Loney v. State* (1908) 88 Ark. 311, 115 S. W. 138, or where a state owns land on both sides of a river and cedes a portion of it on one side thereof. *Nicoulin v. O'Brien* (1916) 172 Ky. 473, 189 S. W. 724. Where the course of the stream is changed by the gradual process of erosion and accretion, the boundary line shifts with the stream, moving with the channel, *McBride v. Steinweden* (1906) 72 Kan. 508, 83 Pac. 822; *Missouri v. Nebraska* (1904) 196 U. S. 23, 25 Sup. Ct. 155, or with a line half way between the shores. See *State v. Muncie Pulp Co.*, *supra*. But when the boundary line is "fixed" in one of two channels it remains there, although the other may become, from natural causes, the more important. *Washington v. Oregon* (1908) 211 U. S. 127, 29 Sup. Ct. 47. It is conceded in all jurisdictions that a violent change in the course of the stream, by process of avulsion, has no effect on the boundary line, whether it be in the middle of the channel, *O'Connor v. Petty* (1914) 95 Neb. 727, 146 N. W. 947; *Randolph v. Hinck* (1917) 277 Ill. 11, 115, N. E. 182, or in the middle of the river itself. See *State v. Muncie Pulp Co.*, *supra*; *Hearne v. State*, *supra*. It has been held that where government operations cause a change from an old channel to a new one, the effect is that of an avulsion and the boundary remains in the middle of the old channel. *State v. Bowen* (1912) 149 Wis. 203, 135 N. W. 494; *James v. State* (1911) 10 Ga. App. 90, 72 S. E. 600. But the mere fact that some streams are so swift that the process of erosion and accretion is much more rapid than in others does not justify the application of the rule with regard to avulsions. *Nebraska v. Iowa* (1892) 143 U. S. 359, 12 Sup. Ct. 396. Where land is transferred from one state to another the presumption is that the change is due to accretion, *cf. Kitteridge v. Ritter* (1915) 172 Iowa 55, 151 N. W. 1097, and if, as in the principal case, a subsequent avulsion restores it, title is not regained by the first state. *Rober v. Michelson* (1908) 82 Neb. 48, 116 N. W. 949.

STATUTE OF FRAUDS—RESCISSION OR VARIATION OF WRITTEN CONTRACTS BY PAROL.—The plaintiff contracted in writing with the defendant to deliver 500 pieces of cloth. After the delivery of 223 pieces, a dispute arose between the parties which resulted in litigation. The dispute was compromised by an oral agreement materially altering the old contract. In an action for the goods delivered under the old contract a counterclaim was set up by the defendant for a breach of either the first or second contract, on the ground that if the second contract was invalid under the Statute of Frauds, the first contract

was still binding on the parties. *Held*, since there was a rescission of the old contract, and since the new contract was invalid, the counterclaim on both grounds must be dismissed. *Morris v. Baron & Co.* (1917) 118 L. T. R. (n. s.) 34.

The parol rescission of a contract within the Statute of Frauds has been upheld in equity both in England and in the United States. *Goman v. Salisbury* (1684) 1 Vern. 240; *Warden v. Bennett* (1911) 145 Ky. 325, 140 S. W. 538. Though it is now established in this country that such a defence, as distinguished from a parol variation, is permitted at law also, *Brownfield's Ex'rs. v. Brownfield* (1892) 151 Pa. 565, 25 Atl. 92, the question seems never to have been squarely presented in England. See Benjamin, *Sales* (5th ed.) 238. Where, however, the rescission of a contract for the sale of land is considered as the surrender of an equitable interest, it has been held that the statute should apply to the contract of rescission; *Dial v. Crain* (1853) 10 Tex. 444; *Dougherty v. Cattlet* (1889) 129 Ill. 431, 21 N. E. 932; but the majority of the courts do not recognize any such distinction. *Warden v. Bennett*, *supra*; *Brownfield's Ex'rs. v. Brownfield*, *supra*. An attempt to vary a contract within the statute by a subsequent parol agreement is generally held to be invalid, *Grand Forks Lumber Co. v. McClure Logging Co.* (1908) 103 Minn. 471, 115 N. W. 406; *Willis v. Fields* (1909) 132 Ga. 242, 63 S. E. 828, although the performance of the agreement would operate to discharge the old contract. *Oregon, etc., Co. v. Elliott, etc., Co.* (1912) 70 Wash. 148, 126 Pac. 406. But when the original contract is supplanted by another, it has been suggested that the unenforceability of the new contract will prevent it from discharging the original one; although the cases usually cited for this proposition, *Augusta, etc., R. R. v. Smith & Kilby Co.* (1899) 106 Ga. 864, 33 S. E. 28; *Price v. Dyer* (1810) 17 Ves. 356, really decide that a subsequent parol modification has no effect on the old contract, and do not distinguish between variation and rescission. It seems, however, that where the evidence, as in the instant case, clearly shows an abandonment of the old contract, the mere fact that the parties made a new one which is unenforceable, should not prevent the extinguishment of the former. See *Price v. Dyer*, *supra*; *Fry*, *Specific Performance* (5th ed.) § 1039.

STATUTES—WIDOW'S ALLOWANCE—EXEMPTION OR INHERITANCE.—The plaintiff, a resident of Austria, filed a petition claiming the statutory allowance in her favor of personal property of her husband, a resident of North Dakota. The husband's legatees opposed the action. *Held*, two judges dissenting, that the statute in question was one of exemption, and not of inheritance, and therefore did not apply to non-residents. *Krumenacker v. Andis* (N. D. 1917) 165 N. W. 524.

Statutes exempting homesteads are without question assumed to be statutes of exemption; and nonresidents are barred from claims thereunder, *Stanton v. Hitchcock* (1887) 64 Mich. 316, 31 N. W. 395; *Tromsdahl v. Beaton* (1914) 27 N. D. 441, 146 N. W. 719, on the ground that the very term "homestead" presupposes the local residence of the claimant. Statutes exempting personal property in favor of widows and children are usually construed as additions to the homestead laws, and hence are statutes of exemption. *Ex parte Pearson* (1884) 76 Ala. 521; see *Barber v. Ellis* (1890) 68 Miss. 172, 8 So. 390. However, it has been held that such statutes are laws of inheritance, and under this construction it follows that

nonresidents may claim as well as residents. *Farris v. Battle* (1887) 80 Ga. 187, 7 S. E. 262. With the exception of homestead exemptions, there is a conflict of authority as to the right of a nonresident to claim under a statute of exemption. The earlier view generally denied the right; *Kyle & Co. v. Montgomery* (1886) 73 Ga. 337; *Kelson v. Detroit, etc., R. R.*, (1906) 146 Mich. 563, 109 N. W. 1057, but, since the reason that barred nonresidents from claiming under homestead laws does not apply to statutes exempting personal property, the more recent tendency of the courts is to hold that such laws include nonresidents in the absence of express provision to the contrary. *Bond v. Turner* (1898) 33 Ore. 551, 54 Pac. 158; *Himmel v. Eichen-green* (1908) 107 Md. 610, 69 Atl. 511; *Carroll v. First State Bank* (Tex. Civ. App. 1912) 148 S. W. 818. The principal case seems sound in holding that the statute in question is one of exemption, because of its position in the code following the homestead provisions, but the decision seems questionable in adhering to the older and harsher view that such statutes do not apply to nonresidents.

TORTS—INDUCING BREACH OF CONTRACT.—The complaint alleged that the defendant had induced the plaintiff's fiancé to break his engagement with her by threatening to put him in an asylum and also by slandering the plaintiff. The action for slander was barred by the Statute of Limitations. *Held*, the plaintiff could not recover. *Homan v. Hall* (Neb. 1917) 165 N. W. 881.

As a general rule an action lies for inducing a breach of contract, unless the defendant can show some justification for his act. See *South Wales etc. v. Glamorgan Coal Co.* [1905] A. C. 239; 8 Columbia Law Rev. 496; *cf. Ashley v. Dixon* (1872) 48 N. Y. 430. What circumstances amount to a valid justification is a matter of public policy. The use of intimidation has always been considered unjustifiable, *cf. Doremus v. Hennessy* (1898) 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, also the use of false defamatory statements, even where the injury resulting therefrom is the loss of any relationship beneficial to the plaintiff. *Lally v. Cantwell* (1888) 30 Mo. App. 524; *cf. Shepherd v. Wakeman* (1674) 1 Sid. 79. In the latter class of cases, however, there is some doubt whether the recovery is based on special damages for slander or for inducing the breach of contract. In the case at hand, since the Statute of Limitations had barred the action for slander, and the demurrer admitted that the breach was caused by intimidation and defamatory statements, the plaintiff's whole right to recover rested on whether the defendant's interference was actionable: *i. e.* whether a contract to marry is so unusual that no action will lie for inducing the breach of it. The view maintained in Cooley, Torts (2nd ed.) 277, that no such action will lie, is not based on any authorities. The only case following this view is *Leonard v. Whetstone* (1904) 34 Ind. App. 383, 68 N. E. 197. There the court held that no action would lie against a parent who induced his child to break a contract to marry. By way of mere *dictum* the court extended this rule to cases of strangers to the contract, basing its view on the unsupported statements of Judge Cooley. The right of a parent to induce a wife to leave her husband, if done in good faith, has also been upheld, if the advice was not maliciously given. *Oakman v. Belden* (1900) 94 Me. 280, 47 Atl. 553. Both of these decisions seem correct, as the parent if acting in good faith, may be justified on grounds of public policy in inducing the breach of a con-

tract to marry, or a separation after marriage. But a stranger, even when acting in good faith, is not justified in inducing separation of husband and wife. *Modisett v. McPike* (1881) 74 Mo. 636. Husband and wife are a status, while a contract to marry is merely an unexecuted contract, but there seems to be no reason why public policy should not prevent interference by a stranger to a contract to marry, just as it has always prevented it after the marriage relation has been established. The defendant having shown no justification for his act should have been held liable.

TRUSTS—LIFE INTEREST AND REMAINDER—STOCK RIGHTS.—A trustee held shares of stock under the duty of turning over the income to a life beneficiary and the remainder to certain institutions. After the creation of the trust, the corporation, not having declared dividends, increased its capital stock and offered the new shares to the old shareholders at par on a *pro rata* basis. The trustee sold these stock rights. *Held*, the proceeds of the sale should be considered principal. *Baker v. Thompson* (App. Div. 1st Dept. 1918) 168 N. Y. Supp. 871.

The weight of authority has been that the right to subscribe for additional shares, and any benefit therefrom, enures to the *corpus* of a trust of stock rather than to the income. *Cook, Corporations* (6th ed.) § 559; *De Koren v. Alsop* (1903) 205 Ill. 309, 68 N. E. 930. This rule has been extended to cover the profit realized from the purchase of bonds in another corporation offered to the shareholders of the first corporation on advantageous terms. *In re Thomson's Estate* (1893) 153 Pa. 332, 26 Atl. 652. The courts have generally refused to consider that the profit accruing from the stock right may have been made possible by surplus earned by the corporation since the establishment of the trust; but in order that the life tenant should be entitled to any or all of this profit, they usually require an actual declaration of a cash dividend, *Greene v. Smith* (1890) 17 R. I. 28, 19 Atl. 1081, but consistently give all of an extraordinary cash dividend to the life beneficiary. *DeKoren v. Alsop, supra*. The endeavor is to prevent the impairment of the *corpus* by a division of the voting power and assets; see *Boardman v. Mansfield* (1907) 79 Conn. 634, 66 Atl. 169; and the considerations in the case of stock rights are the same as those involved in the case of stock dividends, where some jurisdictions give all to the life tenant, *Hite v. Hite* (1892) 93 Ky. 257, 20 S. W. 778, and some all to the remainderman. *Minot v. Paine* (1868) 99 Mass. 101; *Gardiner v. Gardiner* (1912) 212 Mass. 508, 99 N. E. 171; *Gibbons v. Mahon* (1890) 136 U. S. 549, 10 Sup. Ct. 1057. However, there seems to be a growing disposition to examine the substance rather than the form of corporate action, *In re Schaefer*, (1917) 178 App. Div. 117, 165 N. Y. Supp. 19, and to apportion the proceeds from stock dividends and extraordinary dividends after taking into consideration the period during which the money was earned. *In re Osborne* (1913) 209 N. Y. 450, 103 N. E. 723. It is difficult to see why the same rule should not be applied in the case of stock rights, *Holbrook v. Holbrook* (1907) 74 N. H. 201, 66 Atl. 124; see Referee's report in *Cross v. Bliss* (Sup. Ct. County of N. Y. 1914) 52 N. Y. L. J. 1965, but the same jurisdiction which has so definitely adopted the apportionment rule in the former case has, as in the principal case, refused to do so in the latter. *United States Trust Co. v. Heye* (App. Div. 1918) 168 N. Y. Supp. 1051, *accord*.

WAR—MILITARY LAW—PRIORITY OF MILITARY COURTS OVER CIVIL COURTS.—During the present war, an American soldier killed a policeman in Kentucky and was turned over to the civil authorities. After indictment and during preparations for trial a writ of habeas corpus was requested by the father of the soldier with an intervening petition from the military authorities. *Held*, although a state court has jurisdiction, the court martial, under Article 92 of the Articles of War, Comp. Stat. 1916 § 2308a, has priority, and the writ should be granted. *Ex Parte King* (D. C. E. D. Ky. 1917) 246 Fed. 868.

Although the terms of Article 92 of the Articles of War make no express provision for the double jurisdiction of state and military courts over capital offenses in time of war, it was generally assumed under the similar Article 58 of the former Articles of War that this jurisdiction existed. See *Coleman v. Tennessee* (1878) 97 U. S. 509. It follows that although a trial and punishment by the court martial will bar a subsequent proceeding for the same offense brought in the civil courts of the same sovereignty, *Grafton v. United States* (1907) 206 U. S. 333, 27 Sup. Ct. 749, and will not be reviewed by civil courts except to determine jurisdiction, *Ex Parte Vallandigham* (1863) 68 U. S. 243, nevertheless, the state courts may also punish the offense against the laws of the state. See *People v. Gardiner* (N. Y. 1865) 6 Parker Cr. Cas. 143. But, generally, the double jurisdiction of state and federal courts, although mutually exclusive, has been so directed as to permit the court first taking jurisdiction to retain it without intervention. *Cf. Ableman v. Booth* (1858) 62 U. S. 506. However, this recognition of the jurisdictional rights of the court of another sovereignty is a matter of comity and will not render unconstitutional legislation giving priority to a military court over state courts. *Cf. Tennessee v. Davis* (1879) 100 U. S. 257. But it is submitted, in view of the well-defined hostility against military encroachment which has figured so conspicuously in our judicial history, see *Ex Parte Milligan* (1866) 71 U. S. 2; *Coleman v. Tennessee, supra*, that such legislation should be strictly construed and in the absence of express provision by statute no priority should be given to the military courts. Nor can the decision in the instant case be supported on the ground of a judicial recognition of a situation substantially approaching that of martial law, for the recognition of such a situation must come from the legislative or executive authorities, and not from the courts.

BOOK REVIEWS.

GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN. By THOMAS PALMER, JR. Washington: GOVERNMENT PRINTING OFFICE. 1915. pp. 174.

This book is one of a series of similar works which is being published by the Library of Congress on the law and legal literature of various countries. It is, in fact, a concise legal cyclopedia touching upon the numerous subjects into which the whole matter is divided, a sort of broad summary of the sociological and political history of Spain, her positive legislation and the authors who have dealt with these questions.

The codification which has been in existence in Spain for some time has made the work of compilation rather simple, since it offers to the author a system easy to follow; for, glancing at the five codes,—Civil, Penal, Commercial and the Codes of Civil and Criminal Procedure—one is able to keep well before him the main frame of positive legislation. The statutes which during later years, owing to the requirements of modern social life, have been increasing in number, even in countries where codification obtains, did not, although very numerous, throw on the writer's path those difficulties which he would have found had he attempted a similar task for an Anglo-Saxon country.

The best part of the work deals with the historical development of legislation, and it clearly shows that the origin of modern Spain is to be traced back to the Cortes of Cadiz at the time of the Napoleonic invasion. Few writers understand the importance of this convention which met outside the sphere of influence of the invader and which threw off the yoke of the absolute king who at that moment represented not only dynastic interests but national independence as well. This historical treatment, however, is deficient in some respects. For instance, the author has neglected the regional legislatures, or *Fueros*, which had so great an influence in the Iberian Peninsula that the political struggles of the past had—as many of the present time still have—their origin in the desire of each province to have its own legislation. To the American student a survey, however superficial, of this tendency toward legislative disintegration would have been useful, and an analysis of the causes which produced it would have been especially valuable in reference to his own country.

The present civil legislation of Spain is still dominated by the influence of canonical law and a strong conservative spirit. The progress of modern life in that country, while reaching other activities, did not penetrate so easily into the legal principles from which the laws of domestic relations and of property are derived. Thus, divorce has not the slightest possibility of being recognized as a necessary solution of matrimonial difficulties, the status of woman is inferior to that of man, for she is not allowed to administer her own estate, and in legislation covering family property, some relics of the Middle Ages can still be traced. Spanish jurists have followed ideas as they found them to exist and no daring pioneer of juridical thought who is more in harmony with the new conditions of human society has as yet appeared among them as has been the case in Italy and France.

In like manner penal legislation for many years has clung to the old systems. Penalties are divided into degrees and these degrees are rigidly, we would say automatically, applied without any consideration being given to causes of crime which cannot be contemplated by rules of law, but can only be weighed by the sound judgment of the magistrate or that of the jury.

The predominating legislative reaction which prevents the necessary application of new laws to the new conduct of life finds a favorable element in the very system of codification. This system, in fact—while denoting progress in so far as to present in an organic form legislation enacted on specific matters and avoid the contradictions which readily arise in unsystematic legislation—becomes a great obstacle to any gradual reform. Be that as it may, it is an undeniable fact that in Spain, as in all other great Latin countries, there is a legislative tardiness of which no true and proper explanation can be given, notwithstanding the fact that Parliaments and the field of politics are full of free and progressive minds, of extremists who entertain bolder ideas than those of their Anglo-Saxon brethren.

The author of this "Guide" confines himself to general tendencies, but from these one may arrive at the conclusions which we have presented.

The part dealing with constitutional and administrative law is rather poor, not through any fault of the author, but because relatively few jurists in Spain have made a study of public law. Thus the six constitutions which during the past century followed each other under the violent blows of military *pronunciamientos* have found no commentator worthy of mention, and the few treatises on this subject have not the importance which such publications have in countries where the régime is more normal and more earnest attention is given to the fundamental institutions of the Nation.

This "Guide" is really useful as a *vade mecum* for those who devote themselves to the science of law and those who, in a practical field of endeavor, must become acquainted with certain questions; it is in substance the best advice which a man who is both a scholar and a librarian can give.

Orestes Ferrara.

THE ATLANTIC PORT DIFFERENTIALS. By JOHN B. DAISH, Washington: W. H. LOWDERMILK & Co. 1918. pp. xix, 524.

This work is a compilation, fully and accurately indexed, of the findings of official and unofficial investigators. The documents copied contain valuable information and the evident purpose of the compiler was to make easily available the data necessary to an understanding of the causes and claimed justification of the system of differential rates to and from the North Atlantic Ports. Briefly the compilation shows:

Comprehended by the term North Atlantic Ports are the cities of Boston, New York, Philadelphia and Baltimore, and the rate points near each, which for rate making purposes are regarded as part of their nearby port. These cities from the beginning of their commercial importance have actively competed among themselves.

The New York Central & Hudson River Railroad Company and the Erie Railway Company were claimed as New York railroads; the Pennsylvania Railroad Company was called a Philadelphia road and a proprietary interest in the Baltimore and Ohio Railroad Company

was said to be in Baltimore. Using the average of the short line distances to the principal cities, Columbus, Ohio, and west to the Missouri River cities, and taking Boston as the standard; New York is nearer to these western markets by twelve, Philadelphia by eighteen and Baltimore by twenty-two per cent.

Rate wars among the railroads and competition among the cities caused varying rates, but generally there was an agreement that Baltimore and Philadelphia should have lower rates than New York. New York and Boston frequently had the same rates, although at times the Boston rates were the higher. The New York rates were usually taken as the standard, the other cities being given different rates, but without any fixity of the difference. A differential, that is, a fixed difference which automatically, when the standard is determined, fixes the rate to all points related to the standard-rate point, was agreed on (April 5, 1877) by the four railroads already named. On December 1st, 1881, Albert Fink, Commissioner for these trunk lines, in an exhaustive discussion of the subject, stated the problem thus:

"The object is to determine the relative charges for transportation by rail to the seaboard cities, with the view of securing to each of the competing railroad companies a fair share of the traffic, without at the same time justly discriminating between the commercial communities, each of which must have an equal chance unrestricted by arbitrary transportation charges, to compete with the other in the markets of the world."

Allen G. Thurman, E. B. Washburne and Thomas M. Cooley were later selected by the railroads to study the question and to make a report. Their report, formulated after hearing from the interested communities, is the most valuable of the documents copied. Three principles were presented to this Commission as controlling. Baltimore and Philadelphia claimed that distance should be the test. New York relied on cost of service as a governing principle, and New York and Boston both claimed that commercial competition was sufficient to require for them equal rates with Baltimore and Philadelphia. The existence of the Erie Canal was also relied on by New York.

The Thurman-Washburne-Cooley Commission found that distance, cost of service and competition should all be given consideration; but it is apparent from their report that in their opinion competition was the most potent factor. The findings conclude:

"Differential rates have come into existence under the operation of competitive forces; they bear some relation to relative distance and relative cost of service; they recognize as we think the relative advantages of several seaports; and they are subordinate to the great principle which compels the carriers of property competing between the same points and offering equal facilities to their customers, to make the same rates. We, therefore, cannot advise their being disturbed."

Since the creation in 1887 of the Interstate Commerce Commission that tribunal has been frequently called upon to consider the legality of the differentials, and its reports dealing with the subject are copied.

The railroads, the unofficial and the official investigators have all recognized the propriety and legality of the differential. In fixing the amount thereof neither distance nor cost of rendering the service has been given determining consideration.

In reading this useful compilation and in considering the arguments presented on behalf of the several interests the question obtrudes, what effect will the governmental operation of railroads have on the issue? Now that the individual interests of the roads need not be regarded, shall the desires of commercial communities fix rates and differentials and determine how freight shall move, or shall all freight be sent to the consumer by the cheapest and quickest route? The question, although suggested by the history given, is not discussed by the compiler, and is therefore not within the purview of this review.

Edgar Watkins.

TRADING WITH THE ENEMY. By CHARLES H. HUBERICH. New York: BAKER, VOORHIS & Co., 1918, pp. xxxiii, 485.

The true basis of the prohibition Trading With the Enemy has only recently come to be recognized. Rousseau's great declaration that, "*La guerre n'est point une relation d'homme a homme, mais une relation d'Etat a Etat*", led Pinheiro-Ferreira to wonder why the doctrine should exist at all. The English and American courts likewise, for the most part, failed to perceive the essential reasons involved, up to about the middle of the nineteenth century, and upheld the rule to obviate "political danger", the risk of espionage, or betrayal through "the cupidity of corrupted avarice". It is a startling fact that even so late as 1874 Japan was allowing the export of coal to China during the course of the China-Japanese War.

However, at present the potency of economic weapons is clearly understood and the trading non-combatant is recognized as a combatant. Every great nation involved in the war has enacted into law restrictions upon trading with the enemy. The American Act was passed to supplement the common law rules in so far as these would to-day prove inadequate. In places the provisions are more stringent owing to the altered conditions of international trade; in other places, due to more enlightened views as to the position of non-combatants, the old rules have been relaxed. The Act is simply a careful attempt so to restrict American trade that American economic power can be employed most effectively as a supplement to the military program.

It is the precise legal effect of the statute which Mr. Huberich has taken up in his present timely and valuable work. After a brief general discussion of international law and of the common law doctrine of trading with the enemy, he proceeds to consider the Act phrase by phrase, almost word by word, in an attempt to elucidate its provisions. In fact, the volume is really the Trading with the Enemy Act annotated. The author has not only searched out the latest decisions of the American and English courts, but has gathered together also recent Canadian, South African, Australian, Irish and Scotch cases. The discussion is quite full and generous use is made of quotations. Even Continental and Japanese law has received consideration. The work is essentially for the practitioner, who will find therein useful discussions upon such subjects as the scope of the word "trade", the effect of war on contracts, and the status of enemy litigants. Those interested in the historical and theoretical aspects of the subject will

find in this volume an abundance of raw material; but the treatment adopted by the author in grouping the discussion about sections, and even phrases and words, of a particular act prevents any thorough analysis of the general underlying doctrines.

The appendix contains the Executive Order establishing the War Trade Board and the Trading with the Enemy Acts enacted by the United Kingdom, Canada, Australia and South Africa. It is regrettable that the annotations, which make up the real substance of the book, should have been printed in such trying type.

Louis S. Weiss.

BOOKS RECEIVED.

A MANUAL ON LAND REGISTRATION. By ARTHUR G. POWELL. Atlanta: HARRISON BOOK Co. 1917. pp. xv, 449.

GERMAN LEGISLATION FOR THE OCCUPIED TERRITORIES OF BELGIUM. Thirteenth Series. By CHARLES H. HUBERICH and A. NICOL-SPEYER. The Hague: MARTINUS NIJHOFF. 1918. pp. 544.

GERMAN LEGISLATION FOR THE OCCUPIED TERRITORIES OF BELGIUM. Index to Series VI-IX. By CHARLES H. HUBERICH and A. NICOL-SPEYER. The Hague: MARTINUS NIJHOFF. 1918. pp. 70.

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THE DEVELOPMENT OF GERMAN PRIZE LAW.

It is the purpose of the present article to consider some of the more important of the decisions of the German Prize Courts,¹ taking up the various topics substantially in the order of the articles of the Prize Code, which in turn follows the order of presentation in the Declaration of London. The principal amendments to the Prize Code promulgated up to April 17, 1918, will also be noted, as well as the views announced in late works and articles on this topic.

Since the formation of the German Empire there has been no legislative enactment upon the subject of prize law, except the Law of May 3, 1884.² The Law of 1884 provides:

Art. 1. The decision in regard to the legality of a capture in war is to be rendered by specially constituted tribunals (prize courts).

Art. 2. The place of sitting and composition of prize courts, the procedure in cases brought before them, and the duties imposed on other administrative authorities, imperial as well as state, in respect of their cooperation with such courts, will be determined by imperial ordinance.

¹The cases are herein cited by date. A number of cases are published in full in the *Hanseatische Gerichtszeitung*, in the *Zeitschrift für Völkerrecht*, and in Niemeyer's *Zeitschrift für internationales Recht*. Excerpts from decisions are published in the *Deutsche Juristen Zeitung*, in *Recht*, and in the *Leipziger Zeitschrift für deutsches Recht*. The decisions in the cases of *The Fenix*, *The Elida*, *The Glitra*, *The Maria*, *The Indian Prince*, and *The Appam* are published in an English translation (herein made use of by the courtesy of the publishers) in the *American Journal of International Law*; the decisions in *The Medea*, *The Batavier V*, *The Elida*, *The Maria* and *The Primavera* are published in a French translation in *Clunet's Journal du droit international*. A number of the decisions have also been published in English in *Lloyd's List* and in an Italian translation in the *Rivista di diritto internazionale*. Some of the decisions affecting Dutch interests are published from time to time in the *Netherlands Orange Books* and in *Grotius, Annuaire de droit international*. A digest of the current decisions is published in *International Law Notes* (London).

²*Reichsgesetzblatt* (1884) 49.

The Prize Code (*Prisenordnung*) of September 30, 1909,³ and the Prize Courts Ordinance (*Prisengerichtsordnung*) of April 15, 1911,⁴ were promulgated on August 3, 1914.

Procedure is regulated by the Prize Procedure Ordinance of April 15, 1911, as amended. The preliminary proceedings take place before a prize board (*Prisenamt*). Two prize courts are created, one having its seat at Hamburg, the other at Kiel. The prize court consists of five judges, of whom the president and one member must be of the legal profession. The remainder of the court is composed of a naval officer and two laymen, representing respectively the shipping and commercial interests. The government is represented by an imperial commissioner. The owner of the ship or cargo, and other persons interested, have the right to appear as claimants, either in person or by attorney. Alien enemies have the same right to appear or be represented as other persons. If no claim is interposed, the court proceeds to a determination of the case on the basis of the claim submitted by the imperial commissioner. An appeal lies from the prize courts to the Superior Court of Prize (*Oberprisengericht*) in Berlin. This appellate court consists of seven judges, of whom three belong to the legal profession, one is a naval officer, one a representative of the Ministry for Foreign Affairs, and two are lay judges. Proceedings in all the courts are public.⁵

The Prize Code of September 30, 1909, has been amended by the Proclamations of October 18, 1914,⁶ November 23, 1914,⁷ and December 14, 1914,⁸ amending the contraband lists. These proclamations were incorporated in and superseded by the Ordinance of April 18, 1915,⁹ which makes sweeping changes in the lists of absolute and conditional contraband, and amends arts. 33, 35 and 40, so as to assimilate the German law relating to the carrying of contraband to the English law on these points. The lists of contraband were again amended by the Ordinances of May 31, 1916,¹⁰

³Reichsgesetzblatt (1914) 275.

⁴Reichsgesetzblatt (1914) 301.

⁵Huberich and King, Emergency Legislation of Germany, Part IV, Prize Law, 59 Solicitors' Journal 70 *et seq.*; Huberich and King, German Prize Code XVI-XVII.

⁶Reichsgesetzblatt (1914) 441.

⁷Reichsgesetzblatt (1914) 481.

⁸Reichsgesetzblatt (1914) 509.

⁹Reichsgesetzblatt (1915) 227.

¹⁰Reichsgesetzblatt (1916) 437.

June 25, 1917,¹¹ and January 18, 1918.¹² Further important changes were made by the Ordinances of July 22, 1916,¹³ regarding presumption of hostile destination, and of July 16, 1917,¹⁴ regarding enemy character.

LEGAL NATURE OF THE PRIZE CODE.

Art. 1 of the Prize Code provides:

During a war the commanders of H. M. ships of war have the right to stop and search enemy and neutral merchant vessels, and to seize—and, in exceptional cases, to destroy—the same, together with the enemy and neutral goods found thereon.

The Prize Procedure Ordinance specifically provides that it is issued in pursuance of the Law of May 3, 1884, but there is no corresponding reference in the enacting clause of the Prize Code. The Prize Code is, in form, not a law. It was issued by the Emperor, who states in the introductory clause:

I approve the following Prize Code and decree that the commanders of my navy shall proceed in accordance therewith in applying the right of prize.

Is the Prize Code a law or is it merely a set of instructions to naval commanders? The question is one of considerable practical importance. Upon its answer depends the question as to the binding force of the provisions of the Prize Code relating to the payment of damages.¹⁵

The question is not a new one in German jurisprudence. During the war against Denmark, an ordinance was issued in Prussia under date of June 20, 1864.¹⁶ There was no legislative enactment expressly authorizing the promulgation of such an ordinance, and the government based its right to issue the same on the crown prerogative. By a small majority, the Prussian House of Representatives declared the ordinance invalid, especially because it provided for judicial procedure, a matter which, under the constitution, was exclusively within the scope of the legislative power.

¹¹Reichsgesetzblatt (1917) 554. See Appendix.

¹²Reichsgesetzblatt (1918) 43.

¹³Reichsgesetzblatt (1916) 773, more fully noted below.

¹⁴Reichsgesetzblatt (1917) 631, more fully noted below.

¹⁵Heilfron, *Der Lusitaniafall*, *Juristische Wochenschrift* (1915) 486.

¹⁶Preussisches Gesetzblatt (1864) 369. The Ordinance was published on 16th July, 1864. For a summary of its provisions see Huberich and King, *German Prize Code IX-XII*.

The government conceded merely its inability to prescribe the procedure before the ordinary courts, and modern writers regard the Ordinance of 1864 as supportable only as instructions issued by the military powers, and not as a law.¹⁷

As to the legal nature of the present Prize Code, a great diversity of opinion exists among the authorities. Heilfron¹⁸ regards it merely as a set of instructions issued by the Emperor as commander-in-chief of the navy. Rissom¹⁹ views it as a collection of rules of substantive law, while Heymann²⁰ and Rehm²¹ attribute to it a mixed character, partly a set of rules for the guidance of naval officers, partly a set of rules of substantive law. Meene²² regards it as a set of instructions, and not as a source of law, though of importance as indicating the correct rule to be applied by the courts.

In regard to this point, the Superior Court of Prize says, in *The Elida*:²³

The Prize Code contains the principles laid down by the Emperor as commander-in-chief within his imperial jurisdiction for the practice of prize law pertaining to naval warfare, and is, therefore, primarily law not only for the navy but also for the inland authorities, particularly the prize courts, in so far as they have to pass upon the legality of the actions of commanders at sea falling within the prize law.

The question is more fully discussed by the Hamburg Prize Court in *The Zaanstroom*:²⁴

The German law of prize is contained in the Prize Code of September 30, 1909 [*Reichsgesetzblatt* (1914) 275 *et seq.*] which in its contents is substantially identical with the Declaration of London.

¹⁷Arndt, *Kriegsverordnungen*, *Deutsche Juristen Zeitung* (1914) 1152, 1154.

¹⁸Der Lusitaniafall, *Juristische Wochenschrift* (1915) 486.

¹⁹Dietz, *Taschenbuch des Militärrechts* (3rd ed.) 546 cited in *Deutsche Juristen Zeitung* (1915) 910.

²⁰Das *Prisenrecht* des Deutschen Reichs, *Deutsche Juristen Zeitung* (1914) 1047.

²¹Neue Fragen des deutsch-englischen Seekriegs, *Deutsche Juristen Zeitung* (1915) 454.

²²Die staatsrechtlichen Grundlagen der deutschen *Prisenordnung*, *Deutsche Juristen Zeitung* (1915) 910. He, therefore, does not regard the provisions concerning damages as necessarily creating substantive rights.

²³18th May, 1915.

²⁴1st June, 1915.

It is incorrect to assume that the Code is exclusively a set of instructions to naval commanders; the contrary is the case as is shown not alone by the introductory words: "I approve the following Prize Code and decree * * *" but especially by a number of its provisions which can have application only to activities of prize courts and not to the actions of commanders, as, for example, the provisions regarding the award of damages (arts. 8, 12) and condemnation (arts. 17, 41, 42). Adopting the views of Heymann [D. J. Z. (1914) 1047] and Arndt [D. J. Z. (1914) 1154] the Prize Code must be regarded as an enactment having the force of law and based upon the imperial Law of May 3, 1884, relating to prize procedure [Reichsgesetzblatt (1884) 49].

The question as to the nature of the Prize Code appears, therefore, to be settled in favor of the view that it has, in part, the force of substantive law. This view has been confirmed by the Superior Court of Prize. Speaking of art. 37 (2), this court, in *The Semantha*,²⁵ says:

This rule is externally clothed in the form of an instruction to the naval commanders just as the entire Prize Code is, in form, such a set of instructions. But it contains to a large extent rules of substantive law, as has been held repeatedly by this court. There is no basis for assuming that the article here involved is solely an instruction to the commanders. On the contrary, the reasons above given compel its recognition as a rule of substantive law.

Some articles are, however, clearly in the nature of instructions to the commanders, *e. g.*, arts. 114, 124-131. The Schedule annexed to the Code is an order signed only by the Chief of the Admiralty Staff, dated June 22, 1914, relating to the treatment of armed merchant vessels, and is sustainable, if at all, under the power delegated by the Emperor to make such changes in the provisions "as are not of a fundamental nature."

Thus, in *The Glitra*:²⁶

As Wehberg, (Österreich. Zeitschrift für öffentliches Recht, II 3, p. 282) correctly points out, Heilfron [Juristische Wochenschrift (1915) 486] goes too far when he wishes to give to the Prize Code

²⁵6th October, 1916.

²⁶Superior Court of Prize, 17th September, 1915.

the importance only of a command given by the Emperor to the commanding officers of the navy. The Prize Code contains, to a great extent, substantive law. But with regard to the precise question under dispute, Heilfron's characterization is correct. This article (114) is indeed only a command to the commanders of men-of-war. The Commander-in-Chief but not the legislator speaks. He does not desire to make substantive law and does not do so.

LAW ADMINISTERED BY THE PRIZE COURTS.

The law applied by the prize courts is national (municipal) law, and this national law must be applied, even if in conflict with the principles of international law. This doctrine was unqualifiedly laid down by the Hamburg Prize Court in *The Zaanstroom*:²⁷

Some of the claimants in the oral arguments expressed the view that the prize courts must apply the rules of international law, not those of national law. This view cannot be adopted. The prize courts are national tribunals. They are established by their own states to determine whether the organs of the state carrying on the maritime war have complied with the rules which they have been instructed to follow, and to pass on the legal consequences of their acts. From this it follows that the courts have to judge according to the law prescribed by their state, regardless of whether this law is in harmony with existing principles of international law or not. Whether this is so or not is not the province of the prize court to determine, but is left to the belligerent state, which alone is responsible in this regard to other states. The view sometimes advanced by the older authorities, that prize courts are bound to apply international law, even though the rule in question has not become a part of the national law, is to be absolutely rejected. [*Cf.* Heymann, D. J. Z. (1914) 1048; Wehberg, Seekriegsrecht 321.] Practically it would be impossible to carry out this idea. In many cases the so-called rule of international law is uncertain and unascertainable. Where this is not the case, the rule may have ceased to be applicable owing to the attitude of the respective belligerents, or to a change in the conditions forming the basis of its application. For example, it cannot be demanded that one belligerent shall continue to be bound and to require its prize courts to apply an international

²⁷1st June, 1915.

convention which has been violated by the opposing belligerents, although such convention expressly provides that it is to remain in force in the event of war. Furthermore, it requires no detailed argument to demonstrate that certain rules of international customary law have been affected and have become inoperative by reason of new methods of naval warfare, as the submarine warfare. Finally, the argument that if a prize court applies national law, an international prize tribunal such as provided for in the Twelfth Hague Convention of October 18, 1907, might as a court of appeal apply a different law from that applied in the tribunal of first instance, falls to the ground, because such an international prize tribunal does not exist. It was the realization that the establishment of such a tribunal (described as "visionary" by Heymann, *loc. cit.*) would require a unification of substantive prize law as a condition precedent that led to the summoning of the London Conference on Naval Warfare in 1908, whose labors were rendered nugatory by the opposition of England. Before an international prize tribunal could have begun its labors it would have been necessary that the law contained in the Declaration of London should have become a part of the national law of each of the states parties thereto, at least as regards the other contracting states.

This is in accord with the views of recent German writers. So Wehberg:²⁸

As prize courts are national courts, they must apply the law prescribed by their state, even though in the case before them this law is in conflict with international law. The view formerly frequently announced in England and elsewhere, that prize courts are bound to administer international law, is based on a misconception. * * * If a state desires to fulfill its international obligations, it is bound to bring its national law into harmony with international law. It cannot be asserted that national prize jurisdiction is to be criticised because by its means arbitrary rules of naval warfare are set up and imposed on other states. Prize courts always remain the organs of an international person, *i. e.*, of their state, which remains responsible to other states for a proper application of international law. The rules applied by the prize court bind neither other states nor the home state. The government may at any time revise

²⁸ Seekriegsrecht (1915) 321.

the national law by a recognition of the rules of international law.

Prize courts may not assume the responsibility of a revision of national law, not even for the purpose of bringing the national law into harmony with international law. Where the national law conflicts with international law, the national prize courts are bound by the national law. If there exists no express provision in the national law the question must be determined by resort to the other principles of national law. Only when these also fail to determine the question, may the omissions in the national law be supplied by bringing in the rules of international law. * * * From this it follows that national prize jurisdiction is essentially not a matter of international law, but of national public law.

While Schramm²⁹ states that prize courts must decide according to the national and international law of prize, he continues by saying that the latter is applicable only in so far as it has become a part of the national law. So also Heilborn:³⁰

The court obtains jurisdiction under a law of the state. If it declines to obey the laws of the state it would be placing itself above the state, and be denying the very source of its authority.^{30a}

The law administered by the prize courts is to be found primarily in the Prize Code, either in its express provisions, or by analogy.

The prize courts must also apply the provisions of treaties to

²⁹Prisenrecht (1913) 368.

³⁰Grundbegriffe des Völkerrechts (1912) 91.

^{30a}These views are of special interest in view of what was laid down by the English Privy Council in the case of *The Zamora* [1916] 2 A. C. 77, where Lord Parker says:

"It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court, as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive Orders of the King in Council." p. 93.

which the German Empire is a party, and the texts of which have been promulgated as law by publication in the Gazette. Thus, in *The Fenix*,³¹ the Superior Court of Prize says:

The Court of Appeal agrees with the claimants in presuming that the stipulations of Convention No. 6 of the Second Hague Conference must be taken into consideration in the case under review, although they have not been expressly included in the Prize Code. Why this was not done need not be discussed. At all events, the convention named is a state contract ratified by the German Empire, and published in the Gazette, and as such it must be taken into consideration by the prize courts.

But it is essential that the treaty was duly promulgated as law.

A prize court cannot take cognizance of an agreement between the German Government and the government of a neutral country whereby it was stipulated that a particular meaning should be attached to certain words in the list of contraband. It was accordingly held that sawn fir sleepers were subject to condemnation, although it was shown that by agreement between the German Empire and Sweden, the country of the claimant, only mining timber and fuel wood should be regarded as contraband. To be considered by the court such agreements must be published in the form of a law.³² Equally binding upon the prize courts are the treaties entered into between Prussia and other countries, and to which the German Empire has succeeded. Chief among these was the Treaty of May 1, 1828, between the United States and Prussia, reviving certain provisions of the Treaties of 1785 and 1799 between the two countries.³³

JURISDICTION OF PRIZE COURTS.

The Code of Prize Procedure, art. 2, defines prizes as follows:

Prizes within the meaning of this Ordinance are enemy or neutral merchant vessels—that is, all vessels that are not state property—and enemy or neutral goods on board such vessels in so far as they are subject to seizure in the exercise of the right of prize.

³¹17th December, 1914.

³²The Grenland, Superior Court of Prize, 6th October, 1916.

³³The *William P. Frye*. See diplomatic correspondence between the United States and the German Empire, especially the letters of Von Jagow, Minister for Foreign Affairs to Ambassador Gerard, 4th April, 1915, and 7th June, 1915. The *Indian Prince*, Superior Court of Prize, 15th April, 1916. The *Appam*, 11th May, 1916.

Similarly, the Prize Code, arts. 1 and 2, provides:

1. During a war the commanders of H. M. ships of war have the right to stop and search enemy and neutral merchant vessels, and to seize—and, in exceptional cases, to destroy—the same, together with the enemy and neutral goods found thereon. * * *
2. The law of prize does not apply to public vessels of a neutral state. Public vessels of the enemy are confiscable under the laws of war, without further proceedings. (Cf., however, art. 7.) Public vessels comprise ships of war as well as ships used in the public service of, and subject to the command of, the state. Other ships, the property of the state, are placed in the same category. * * *

The jurisdiction is more limited than that of an English prize court. It does not extend to German vessels, even if engaged in prohibited commerce or in assisting the enemy. Jurisdiction, furthermore, does not extend to German cargo on board German, neutral, or enemy vessels.³⁴

The captor must have been exercising a right of prize not a purely military right. Thus, in *The Geertruida*,³⁵ a claim was presented by the neutral (Dutch) owners of a fishing vessel sunk by a German submarine. It appeared that the fishing vessel bore no flag or other indicia of neutral character, and the commander of the submarine from certain circumstances concluded that it was endeavoring to ram the submarine and to fire upon the latter from a deck gun. The fishing vessel was fired upon, and sunk. Upon a claim by the owners it was held that the prize courts were without jurisdiction, the jurisdiction being confined to cases where enemy or neutral vessels or cargoes are seized in the exercise of a right of capture. It is essential to the idea of a prize that it be seized. Here there was never a seizure or an intent to seize; there was the exercise of military force, to resist an attack, as provided for in Prize Code, art. 55 (a), not to overcome a resistance to capture within art. 15, nor a destruction within arts. 113, 115.

A seizure³⁶ (*Beschlagnahme*) or at least an intent to seize the vessel or cargo is essential in order to confer jurisdiction on a

³⁴The *Nyanga*, Hamburg Prize Court, 25th September, 1915.

³⁵Hamburg Prize Court, 8th December, 1916.

³⁶The words "seizure" (*Beschlagnahme*), "capture" (*Aufbringung*) and "taking" (*Nehmung*) are identical in the meaning attached to them in international law and marine insurance. *Diedrichsen & Co. v. Transatlantische Gütersversicherungsgesellschaft*, Imperial Supreme Court, Civil Cases, 25th October, 1916, 38 *Hanseatische Gerichtszeitung* (Hauptblatt) 28.

prize court. A seizure must be distinguished from the exercise of the right of visit and search, which affect the vessel and cargo only temporarily, while a seizure is always with a view to condemnation as prize.³⁷ It follows from this that a prize court is without jurisdiction to assess damages in cases where a war vessel in order effectively to exercise the right of visit and search orders a neutral vessel into a German port, where after inspection the vessel is released.³⁸

³⁷*Ibid.*

³⁸This is brought out clearly in the decision of the Superior Court of Prize in *The Bertha Elizabeth*, 3rd July, 1915:

The subject of prize jurisdiction is the determination of the legality of captures made during war. (Prize Code, art. 1.) Prizes are merchant vessels in so far as they are subject to seizure (art. 2). Seizure in this sense is synonymous with capture (art. 1, par. 2). The object of this action is the condemnation of the vessel in question in favor of the captor state (art. 17) and, therefore, in general, it should take place only when the search of the vessel shows such circumstances that the commander may reasonably expect a condemnation of the ship (art. 94). From this it follows that it is essentially a question of fact whether a ship brought into port is to be regarded as seized (captured) in the sense of the Prize Code, and in this connection the decisive factor is the intent of the commander.

In the case at bar, the ship was stopped on the afternoon of April 11, 1915, in the North Sea while engaged in fishing, and, as appears from the report of the commander of the war vessel, was brought for search to Cuxhaven. Nowhere is there any mention of a capture or seizure. In the ship's log there is only a note to the effect that the vessel was stopped and was brought to Cuxhaven for examination. After an examination had taken place, the ship was released on the morning of April 15 as non-suspect. From all of this, it appears that there was no capture with the intent of bringing about the condemnation of the ship. The capture of a vessel, it is true, consists essentially of certain acts culminating in the commander taking forcible possession of the vessel and compelling it to follow his orders. But just as the strict adherence to all of the formal instructions contained in the Prize Code is not an absolute condition to the validity of a capture, so also every temporary taking into possession of a ship by the commander of a war vessel and resulting in compelling the vessel to follow his orders cannot be regarded as a capture within the meaning of the Prize Code. As above stated, it is necessary to determine what object the commander had in view in the proceedings. Many cases are conceivable in which a commander subjects a vessel to his orders—as Schramm expresses it in his *Prisenrecht*, p. 306—brings it into a relation of subjection to himself, but where there is no capture. The necessities of war, more particularly, may require that all vessels within a certain marine area should at stated times be generally subjected to a minute search as regards their actions, but where, nevertheless there is no sufficient ground for a capture in the proper sense of the term. It is true that according to art. 91 of the Prize Code, the commander must proceed to a "provisional" capture when such measures result in substantial damage to the vessel that is subjected to search. But even the disregard of this regulation which may be regarded as being simply in the nature of an instruction would not give the prize courts jurisdiction, because such jurisdiction attaches only in the case of a complete capture and it is therefore not necessary in the case at bar to examine whether the conditions precedent of this regulation were complied with. In the view of the court in the present case, there is simply a question of a belligerent measure, the legality of which is not subject to revision by proceedings in a prize court.

LIMITS ON RIGHT OF CAPTURE.

The Prize Code, art. 3, provides that the right of capture may not be exercised within neutral territorial waters, nor within waters which by treaty are exempted from warlike operations or closed to ships of war. The right of capture, therefore, clearly extends to the high seas³⁹ and to the waters under the jurisdiction of any belligerent. There is no question that the right may be exercised within the territorial waters (maritime belt, *Küstengewässer*) of the belligerents.⁴⁰ Within the term "territorial waters" are included the bays and ports used for the purposes of ocean shipping, and this is not affected by the circumstance that the outlet from such port is through neutral territory. It has been held accordingly, that a capture may take place in the port of Antwerp, although the mouth of the Scheldt is neutral territory.⁴¹

Great diversity of opinion exists among the authorities as to the extent to which the right of capture is exercisable on rivers and closed seas within the territory of the belligerents. Rettich⁴² takes the extreme view that the right is exercisable in all places where it can take place by means of war vessels, including all rivers and canals and even on land within radius of the ship's guns. Liszt, in the later editions of his work on International Law,⁴³ believes that the right of capture may be exercised in all waters capable of being navigated by ocean-going vessels, and this is also the view of Biensfeldt.⁴⁴ Boeckner⁴⁵ confines the right to

³⁹Including straits connecting parts of the same (Sound) or enclosed high seas (Baltic). Schramm, *Prisenrecht* 61; Boeckner, *Der Kriegsschauplatz* 63, 64.

⁴⁰Schramm, *Prisenrecht* 64. The estuary of the Trave between Lübeck and Travemünde cannot be regarded as one harbor basin. The course of the Trave between the two places (a distance of 20 kilometres) cannot be regarded as a harbor, within the meaning of the Sixth Hague Convention, art. 1 (2), and a vessel captured within this area is liable to condemnation. The fact that the regulation of the navigation of the river is subject to the jurisdiction of the two harbor authorities does not alter the situation. The *Primula*, Superior Court of Prize, 18th June, 1915.

⁴¹The *Comte de Smet de Naeyer*, Superior Court of Prize, 17th November, 1916. See also Kohler, *Die Schiffe vor Antwerpen*, *Deutsche Juristen Zeitung* (1914) 1225.

⁴²*Prisenrecht und Flussschiffahrt*, Virchow and Wattenbach's *Sammlung gemeinverständlicher wissenschaftlicher Vorträge* No. 151, p. 735 *et seq.*

⁴³*Völkerrecht* (10th ed.) § 41. *Cf.* the views expressed by the same author in the 2nd and in the 8th editions of his work.

⁴⁴*Das Prisenrecht in Flussläufen*, 10 *Zeitschrift für Völkerrecht* 375.

⁴⁵*Der Kriegsschauplatz* 90 *et seq.*

the maritime belt, while Perels⁴⁶ and Schramm⁴⁷ assert that the right is exercisable in all waters actually serving the purposes of ocean navigation. The question does not appear to have been decided by the courts.⁴⁸

Article 3 of the Prize Code provides:

The right of capture and seizure cannot be exercised:

a. Within neutral territorial waters, *i. e.*, within a marine area of a width of three sea miles, reckoned from low water mark, following the shore line and the islands and bays thereof. Islands situated not more than six sea miles from the coast of a mainland belonging to the same state, and bays whose coast line is in the exclusive possession of neutral states, and the arms of which are six sea miles or less apart are to be regarded as part of the shore line.

The interpretation of this article came before the Superior Court of Prize in *The Elida*.⁴⁹

The illegality of the seizure is first of all based on the fact that it took place within the zone of neutrality claimed by Sweden, *i. e.*, within four miles of the Swedish coast. Whether this was really the case is disputed, whilst it is certain that the seizure took place outside the three mile limit. In any event this is of no importance, since this objection was properly dismissed by the judge.

It is true that a considerable number of states have extended by national law their territorial jurisdiction beyond the three mile limit, either generally or with regard to certain legal rights. This particularly applies to Sweden and Norway, which extended their national waters to a distance of four miles. A number of other states even went much further in this respect. But a special international title, valid in relation to the German Empire, and therefore to be taken into account by the prize court, does not exist, for up to the present time the Swedish claim has been recognized only by the Norwegian Government. According to official information from the German Foreign Office, Germany, especially in

⁴⁶Das internationale öffentliche Seerecht der Gegenwart 159.

⁴⁷Prisenrecht 64.

⁴⁸See, however, *The Comte de Smet de Naeyer*, Superior Court of Prize, 17th November, 1916, holding that captures may be made in the port of Antwerp.

⁴⁹18th May, 1915.

the course of the discussions concerning this matter which took place in 1874, did not accept Sweden's point of view, but treated the question of national waters as an open one, while England insisted upon the three mile limit. Similarly in 1897, when the Swedish Government addressed a communication to the German Legation at Stockholm concerning the fishery jurisdiction, the German Government restricted itself to raising no objection against Sweden's claim to a four mile boundary for the fishery and the question of the neutralization of this marine area in case of war was not thereby affected.

Therefore, under these circumstances, the decision must rest upon the basis of the German Prize Code, which in art. 3 (a) forbids the application of prize law within a zone of only three nautical miles from the low water mark of neutral coasts. * * * Thus far this conception also agrees with the legal opinion of Professor Dr. von Liszt, produced by the claimants.

Contrary to this opinion, however, the Superior Prize Court further is of the opinion that the instruction in question of the German Prize Code in no way violates the general principles of international law. Heretofore, the maritime boundary of states has been generally recognized in theory and practice as being three nautical miles distant from the coast. Originally, it was based on the carrying distance, corresponding to the gunnery technique of those times, of ships' and coast guns. It is true that at present this reason is no longer applicable. Here, however, the axiom *cessante ratione non cessat lex ipsa* applies, and although numerous proposals and opinions have been put forward with regard to a different delimitation of the national waters, it cannot be asserted that any other method has in practice met with the general concurrence of the maritime states. This is also true of the view put forward in the above mentioned opinion, according to which each individual state is entitled to extend, by means of independent regulations, the boundary of its national waters beyond the three mile zone as far as gun range, the former limit nevertheless to be regarded as a subsidiary international boundary. With the range of present day guns this would lead to quite intolerable conditions, and give to single states the possibility of including within their national territory extensive tracts of the open sea the freedom of which is to the interest of all maritime states. To a certain extent this is also

acknowledged by Liszt in his opinion, for according thereto the regulation of the individual state is not alone sufficient; the absence of objection on the part of other states is also required. Thereby in reality the permissibility of an extension of the territorial waters is founded not so much upon the independent regulation by the single state, as upon the supposition of a tacit acknowledgment of such an extension by the other states. A mere failure to object, however, is not identical with a positive concurrence of the nations. Furthermore, it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the three mile zone, this by no means represents a concession to the effect that in all other respects the waters in question are included within the territorial jurisdiction.⁵⁰

A capture is not invalidated by the circumstance that the captured vessel is navigated through the territorial waters of the neutral state to which it belongs. A Swedish vessel was captured on the high seas while on a voyage from Gothenburg to English ports. On the voyage to the German port under the direction of the German captor, the vessel passed through Swedish territorial waters. The Superior Court of Prize held⁵¹ that this circumstance did not entitle the vessel to be released. There is no rule of international law to this effect, and art. 10 of the Thirteenth Hague Convention expressly provides that such acts are not to be deemed a violation of neutrality. The rule is otherwise, if the capture itself was effected within neutral territorial water. In the discussions at the Hague Conference of art. 23 of the same Convention, an amendment was offered to the effect that where a prize is brought into a port of the neutral state under whose flag the vessel sailed, the prize must be released. This view was not adopted. *A fortiori*, mere transit through the territorial waters, cannot operate to invalidate a capture.

In general, a capture is made by vessels of war. But it may also be made by land forces or by the port authorities. Thus, in *The Primula*,⁵² the seizure took place by the port authorities of Lübeck upon orders of the Secretary of the Interior.

In *The Tello*,⁵³ a Swedish vessel was captured by a German

⁵⁰Accord: The Crimdon, Kiel Prize Court, 6th January, 1915.

⁵¹The Thorsten, Superior Court of Prize, 14th April, 1916.

⁵²Superior Court of Prize, 18th June, 1915.

⁵³Superior Court of Prize, 26th June, 1916.

submarine for carrying contraband, and a prize crew placed on board. The submarine ordered the prize to follow, and proceeded towards a German port, when the Tello, a Norwegian vessel, came into view. The officer of the prize crew signalled from the Götaland, which was flying the German war flag, to the Tello to stop, and then proceeded in one of the Götaland's boats, with an engineer to the Tello, and caused this vessel to be sunk. In subsequent prize proceedings against the Götaland, it was held that she was not guilty of carrying contraband. On behalf of the claimant it was contended that the destruction of the Tello was unlawful, because (1) the orders had not emanated from the commander of the submarine, and (2) that they had been carried out from neutral territory, to wit, from the Swedish steamer which had been wrongfully seized. The Superior Court of Prize held as to the first point, that a capture may be effected by any person who at the particular moment holds the command. As to the second contention the court said:

Nor can the lawfulness of the seizure be impugned on the ground that at the time of the capture the Götaland was a neutral vessel, though flying the German war flag. It is quite true that the right of capture cannot be exercised on neutral ground. It may also be correct that even against a vessel encountered on the high seas no measures connected with the right of capture may be taken from a war vessel which is within the territorial waters of a neutral state. This, however, is not the case here. The doctrine that ships are portions of the territory of the state to which they belong must not be taken literally. The meaning is not that the territory of the state is extended by the fact of the vessels sailing out to sea. By this rather figurative *dictum*, it is intended to convey in a general manner that in many respects the national laws are still applicable in the case of the vessel and her crew and her passengers after they have left the actual territory of the state. The prize crew which was put on board the Götaland did not by that act transfer itself on Swedish territory but remained still on the high seas. * * * If by the law of nations it was admissible that the Tello should have been held up and destroyed from a neutral merchant vessel, and with the use of her boat, the lawfulness of these measures remains unaffected, should the use made of the Götaland have been against the interests of that steamer and not justifiable to the

Swedish State. But even from the point of view of the judgment rendered in the case of the *Göta-land* and her boat was illicit. According to the facts of the case the commander of the submarine which had seized the *Göta-land* in pursuance of art. 16 (b) of the Prize Code was even justified in using the vessel as an auxiliary ship. At the moment of seizure, the officer is not able to ascertain with certainty all the circumstances which determine the guilt of the vessel that has been arrested. The procedure recognized by the law of nations permits the seizure of the vessel on adequate suspicion, since, as such, the seizure is a permissible measure, subject to examination in the prize court. In the face of this fact, the provision in the Prize Code, according to which the commander may use the vessel seized as an auxiliary ship, can only be construed to mean that such use does not depend upon the objection to the legality of the seizure, but merely on the fact that there have been adequate reasons for the seizure. (Prize Code art. 8.)

It has been seen above that prize jurisdiction does not extend to the public vessels of any state.⁵⁴ Such jurisdiction is limited to merchant vessels of an enemy or neutral state. A dredger is a merchant vessel within the meaning of the Prize Code, especially where it is equipped with lights, boats, crew rooms, compasses, *etc.* In general, a vessel is any craft floating upon the water, regardless of the purposes for which it is used, whether capable of self-propulsion or not. It may be used for the transportation of passengers or freight, or for other purposes, as cable-laying, salvage, ice-breaking. The expression "merchant vessel", as used in the Prize Code, covers all vessels, except public vessels, with this limitation, that the vessel must on account of its size or character be of some importance.⁵⁵ For the reason last given, small lighters and tugs are not seizable.⁵⁶

The question as to the legal status of private yachts came up before the Superior Court of Prize in *The Primavera*.⁵⁷

Finally we must take up the defense that the Prize Code is not applicable because the *Primavera* as a steam yacht is not a merchant vessel within the mean-

⁵⁴Prize Code, art. 2.

⁵⁵De Brussels 31, Superior Court of Prize, 27th April, 1917.

⁵⁶The Assistant, Superior Court of Prize, 27th June, 1916.

⁵⁷6th October, 1916.

ing of the Prize Code. This defense was also properly rejected by the court below. It is clear from the provisions of the Prize Code, even in the light of the proceedings at the London Conference, from which issued the declaration regarding naval warfare upon which the Prize Code is based, that every vessel, not the property of the state, must be regarded as a merchant vessel within the meaning of the Prize Code. In the discussions regarding blockade, the American delegate, Wilson, declared that the expression "Navire de commerce" was susceptible of different interpretations; that in general it is regarded as meaning the same as "merchant ship" and that vessels might be classified under two heads, namely, *les navires d'Etat* and *les navires privés*, and that the latter expression embraced every kind of private vessel such as *navire de commerce*, *yacht des particuliers*, *etc.* He asked for an interpretation of the expression "by the Conference" and this was given as follows: "Après explication, il est entendu que le sens indiqué par M. Wilson sera considéré comme le sens exact du mot *navire de commerce*, qui, ainsi que l'indiqué M. Renault, comprend tous les navires autres que les navires d'Etat." (Cf. Niemeyer, *Urkundenbuch zum Seekriegsrecht* III, p. 1545.) In this sense, therefore, was the expression used in the Declaration of London, and the expression "merchant vessel" in the Prize Code must be understood in the same sense. This is expressly said in art. 2 of the Prize Procedure Ordinance, and as may be assumed without further question without regard to the authentic interpretation of the expression in the London Conference. The same appears also from the Prize Code itself. In art. 10 thereof, there is only a general reference to enemy vessels and in art. 6, certain classes of vessels are exempted from capture which unquestionably do not come within the meaning of merchant vessels in the narrow sense in which the claimant desires this expression to be interpreted. If under the expression "merchant vessels" only vessels engaged in maritime commerce were to be included, it would not have been necessary to exclude from capture hospital ships, coastwise fishing vessels, vessels engaged in religious work, *etc.*; because since these vessels are not engaged in maritime commerce, they would, under this view, not come within the category of merchant vessels.

As to objects on board the ship, it has been held that ship's accessories share the fate of the vessel.⁵⁸ Ship's stores are accessories in so far as they are necessary for the voyage upon which the ship is engaged;⁵⁹ where the amount is in excess of such needs such stores are regarded as cargo.⁶⁰

Jurisdiction extends to enemy and neutral cargo on board enemy or neutral vessels.⁶¹ The personal effects of the crew are neither a part of the vessel nor are they cargo within the meaning of the Prize Code,⁶² and consequently the Prize Court is without jurisdiction to assess damages in case of alleged illegal destruction.⁶³ The word "goods" (*Güter*), as used in art. 115, means merchandise (*Handelsgüter-marchandises*).⁶⁴ The same applies to supplies, the personal property of the master.⁶⁵

Whether bunker coal is to be regarded as cargo, as was done in *The Indrani*⁶⁶ and *The Indian Prince*,⁶⁷ or as ship's stores depends upon the circumstances of each case.

While art. 7 of the Prize Code, provides for the inviolability of letter mail, parcel post is part of the cargo, and is subject to seizure as such.⁶⁸ This subjects parcel post to the provisions of the Declaration of Paris, as regards countries that have ratified it.⁶⁹ This is also in accord with the declaration of the German delegate to the Second Hague Peace Conference, Dr. Kriege, that the Eleventh Hague Convention applies only to letter mail (*correspondance postale*).

In this connection it is interesting to note that two of the best known German authorities on international law, von Liszt⁷⁰ and

⁵⁸The Neptune, Hamburg Prize Court, 11th December, 1915.

⁵⁹The Pass of Balmaha, Hamburg Prize Court, 18th December, 1915.

⁶⁰The Cocos, Hamburg Prize Court, 11th December, 1915, affirmed, Superior Court of Prize, 15th May, 1916.

⁶¹Not to German-owned cargo on any vessel. The Nyanga, Hamburg Prize Court, 25th September, 1915; The Lestris, Hamburg Prize Court, 18th May, 1917.

⁶²The Cocos, *supra*, footnote 60. A sextant belonging to the mate released. The Fama, Hamburg Prize Court, 16th November, 1917.

⁶³The Cocos, The Nogell, The Neptune, Hamburg Prize Court, 11th December, 1915.

⁶⁴The Cocos, *supra*, footnote 60.

⁶⁵The Björn, Hamburg Prize Court, 30th October, 1915.

⁶⁶Hamburg Prize Court, 3rd July, 1915.

⁶⁷Superior Court of Prize, 15th April, 1916.

⁶⁸The Björn *supra*, footnote 65.

⁶⁹Neukamp, Deutsche Juristen Zeitung (1916) 567, 574.

⁷⁰Die Verbindlichkeit der völkerrechtlichen Verträge über das Kriegesrecht, Leipzig Zeitschrift (1915) 166-174.

Zitelmann⁷¹ contend that in view of the fact that Russia, Montenegro, Serbia and Turkey are not parties to the Eleventh Hague Convention, the Convention is not binding on any one of the signatories, and that consequently even letter mail is not inviolable.⁷²

Jurisdiction does not extend to enemy goods on board German vessels, nor to such goods after they have unloaded from any vessel. In other words, the German prize law does not adopt the doctrines announced in cases like *The Miramichi*⁷³ and *The Roumanian*.⁷⁴

The latter question came before a civil court, and was finally determined by the Imperial Supreme Court in *Prenzlau's Fabrikwerke v. Transatlantische Güterversicherungsgesellschaft*.⁷⁵ Insurance had been effected to cover risks of seizure and condemnation while the goods were on board. The goods were shipped on board an English vessel, which upon the declaration of war put into an English port, where the cargo was unloaded and subsequently seized. It was held that the insured was not entitled to recover, as the risk was not insured against. The subsequent seizure and condemnation cannot be regarded as the result of the master's determination to put into an English port. Since the Crimean war a custom of days of grace for enemy vessels had grown up and this custom received recognition in the Sixth Hague Convention. Even if the binding force of this Convention in international law is doubtful, in view of the reservations made by Russia and Germany in respect of arts. 3 and 4, nevertheless the provisions show that at that time the former purpose of enriching the captor state had been superseded.

This view-point of the protection of *bona fide* commerce is especially true as regards enemy goods entrusted to the vessels of the belligerent. The object of the prevention of enemy sea-borne commerce only justifies the detention and retention of such property, but not its condemnation * * *. If it is

⁷¹Die Anwendbarkeit der Haager und Genfer Abkommen im gegenwärtigen Kriege. 35 Archiv für öffentliches Recht 1, 23. Cf., however, the same writer's Der Krieg und das Völkerrecht, in Deutschland und der Weltkrieg 661.

⁷²For a contrary view, see Neukamp, in Deutsche Juristen Zeitung (1916) 567.

⁷³[1915] P. 71.

⁷⁴[1916] 1 A. C. 124.

⁷⁵31st January, 1917, Hanseatische Gerichtszeitung (Hauptblatt) (1917) 61.

taken into consideration that during a war enemy property is not ordinarily transported on the vessels of the opposing belligerent, and if this occurs in rare cases it is punishable under the law relating to treason or trading with the enemy, it is clear why modern laws and international conventions regarding prize law do not consider the case of enemy goods on board vessels of the opposing belligerent, and the point is practically left out of consideration by the text writers. So, *e. g.*, art. 4 of the Sixth Hague Convention refers only to enemy goods on enemy vessels. So also, arts. 58-60 of the London Declaration of 1909 deal only with enemy or neutral goods on enemy vessels. Art. 2 of the German Code of Prize Procedure of April 15, 1911 [R. G. Bl. (1914) 302] defines prizes as follows: "Prizes within the meaning of this ordinance are enemy or neutral merchant vessels * * * and enemy or neutral goods on board such vessels, in so far as they are subject to seizure in the exercise of the right of prize." Similarly, the German Prize Code of September 30, 1909, art. 1 [R. G. Bl. (1914) 276]. Compare also art. 39 of the Oxford Regulations of the Institute for International Law. Westlake, *International Law* (1907) II, p. 129, describes the effect of the Paris Declaration as follows: "We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which as such is capturable at sea." Wehberg, who deals with the question of the condemnation of enemy property on vessels of the forum [*Land-und Seekriegsrecht* (1915) 175, 176] is of opinion that, from a legal standpoint, condemnation is permissible because the Declaration of Paris is not subject to extensive interpretation; but he adds: "In practice the states will here also take into consideration that their merchant vessels derive a benefit from the transportation of enemy goods, and will probably decide, in conformity with arts. 48 and 49 of the English Naval Prize Law and sec. 41 (2) of the Japanese Prize Law of 1904, that enemy goods are subject to condemnation only if the vessel is at the same time subject to capture under the provisions of the local law." Similarly Schramm, *Das Prisenrecht* (1913) 98. But as to enemy goods on board vessels of the forum, Wehberg properly holds (*loc. cit.* 199, note 1) art. 4 of the Sixth Hague Convention to apply, because goods on board enemy vessels cannot be treated more favorably than those on own vessels of

the captor. For a contrary view: Huberich, *Englisches Prisenrecht* (1915) 56. It is true that during the present war, the English prize courts in the present case and in several other cases have ordered the seizure and condemnation of enemy property. In so doing, they have given to the often-announced rule of English prize law, that the right of seizure extends to enemy property at sea or afloat in port. * * * [*The Miramichi*, Prize Cases (1916) 147 544; Huberich, *loc. cit.* 52] an extensive interpretation, so as to cover seizure and condemnation on land, where the property has not been delivered to the owners. (citing and discussing *The Roumanian*, *The Achaia*) * * * Whether these decisions are correct from a juristic standpoint, it is not our purpose to discuss. At all events they do not conform to the progressive views on international law prevailing prior to the present great war, nor meet the expectations extensively cherished before the war as to the administration of international law in the event of war.

That goods should be seized and condemned after being unloaded was an unexpected circumstance with which the insured at the time when the contract was made did not reckon, and which was not to be reckoned with when the master determined to take the vessel to England. Hence, this determination of the master cannot be regarded as the equivalent of the seizure and condemnation insured against.

It is immaterial where the cargo is carried, whether in the hold or on deck, or suspended from the side of the vessel, or taken in tow either alongside or behind the vessel. It was accordingly held that empty lighters that are being conveyed to their destination by a tug are cargo.⁷⁶

NATIONAL CHARACTER.

The national character of a vessel is determined primarily by the flag which she is entitled to fly.⁷⁷ Neutral vessels engaged in trade closed in time of peace, or resisting search or capture are also regarded as having an enemy character.⁷⁸

By an Ordinance of July 16, 1917,⁷⁹ neutral vessels, totally or

⁷⁶The *Zuiderzee* and The *Gouwzee*, Superior Court of Prize, 27th April, 1917.

⁷⁷Prize Code, art. 11.

⁷⁸Prize Code, art. 16.

⁷⁹Reichsgesetzblatt (1917) 631, 652.

in greater part owned by subjects of an enemy state, or chartered by an enemy government, or sailing in the interest of belligerent operations of the enemy are also to be treated as enemy vessels. This Ordinance adds a new article (11 a) to the Prize Code, as follows:

A neutral vessel is to be regarded as an enemy vessel if it is owned wholly or for the greater part by enemy subjects.

Within the meaning of this provision, juristic persons or other associations having their place of business within an enemy country are to be regarded as subjects of an enemy state. If the capital is predominantly owned by enemy subjects, or if the business is conducted and supervised by enemy subjects and in an enemy country, the legal position is the same as if the place of business were in an enemy country.

Unless the facts show to the contrary, enemy direction or supervision of the business will be assumed if enemy subjects participate therein or if the business is partly directed from an enemy country. The same is true if it be shown that a participation in the capital or profits of the business by enemy subjects exists, or if the means for carrying on the business are obtained from an enemy country.

The question of a transfer of flag after the outbreak of war arose in *The Pass of Balmaha*.⁸⁰ The vessel was sailing under the American flag to which she had been transferred by her former British owners in February, 1915.

Regarding the vessel the question arose as to whether it is to be regarded as an enemy vessel inasmuch as it was transferred after the outbreak of the war, in January, 1915, from the English to the American flag. The provisions of law involved are art. 2 of the Prize Code and art. 56 of the Declaration of London of February 26, 1909.

The Prize Code even more clearly than the Declaration of London declares that the transfer of a ship from an enemy to a neutral flag after the outbreak of hostilities will invest the vessel with a neutral character only if the transfer had no relation to the war; when the transfer results from causes having no connection with the war. In this connection the Prize Code interprets art. 12a of the Prize Code as meaning that it rests not exclusively on the

⁸⁰Hamburg Prize Court, 18th December, 1915.

conviction of the commander (that the transfer would have taken place even if war had not broken out) but that the prize court must itself determine whether the commander of the war vessel after proper consideration should have come to the conclusion that the transfer of flag would have taken place even if war had not broken out.

Where the transfer took place after the outbreak of the war, it is not sufficient to show that there was a genuine and unconditional sale to the neutral. The parties must also have acted in good faith. The claimants must show that in purchasing the vessel, the consideration that the vessel was thereby placed under the protection of the neutral flag was not one of the motives of the transaction.⁸¹

Art. 20 (c) of the Prize Code requires that the title should be in the neutral before the vessel sails. Where the property is transferred by delivery of the bills of lading, such bills of lading must be in claimant's possession when the vessel sails. It is not sufficient that the delivery took place some time before the vessel was captured. Nor is an unsigned bill of lading a proper document to evidence transfer.⁸²

Where goods were bought but warehoused by the seller, with the reservation of the right to sell the specific goods and to replace them by similar goods, there is not a sufficient transfer of ownership. But acquisition of ownership by a purchasing agency of the claimants in their behalf is sufficient.⁸³

According to art. 20, in the absence of clear proof of the neutral character of goods found on board an enemy vessel, the presumption is that the same are enemy property. It must be shown that the goods were neutral property when they left port, and that they have not become enemy goods in transit. All bills of lading must be produced.⁸⁴

PASSING OF PROPERTY.

The property in the captured vessel or seized cargo passes as the result of the decree of condemnation, not at the moment of

⁸¹The *Cubano*, Superior Court of Prize, 27th October, 1916; The *Trondhjemsfjord*, Superior Court of Prize, 15th December, 1916.

⁸²The *Lestris*, Superior Court of Prize, 8th January, 1918.

⁸³*Ibid.*

⁸⁴The *Lestris*, Hamburg Prize Court, 18th May, 1917; The *Dania*, Kiel Prize Court, 5th December, 1915.

capture.⁸⁵ The captor state acquires an original title by virtue of *occupatio jure belli*—not a derivative one.⁸⁶

The captor, therefore, takes free of any liens. Thus, in *The Fenix*:⁸⁷

The firm of Gehrckens bases its claim furthermore on the fact that because of outlays made on behalf of the ship's captain, it had acquired a bottomry right on the ship, the proving of which was reserved in case of condemnation. Here, too, may be left out of consideration the question whether the firm on account of its outlays, or a part thereof, actually acquired a real right in the S.S. *Fenix*, since the bottomry right would at once become void upon the condemnation of the ship. Condemnation, according to prize law, is an original method of acquiring possession, an *occupatio jure belli*, which, according to generally acknowledged principles of international law, gives to the occupant the ownership of the object seized free of every encumbrance. The decision in the case of *The Maria Glaeser*, rendered by the English Prize Court at its third session, after mature consideration of the practice of other prize courts, shows that the English Prize Court also takes this point of view. (The Times, 17th September, 1914). In that case it was a matter of a mortgage acquired by a neutral before the capture of the ship, and the consideration of the claim of the neutral mortgagee was denied on the ground that according to the principles of prize law, the rights of third parties in a captured ship cannot be recognized. It is also hinted in the decision that the case would not have been adjudged differently if the mortgagor had been a British subject.

In the present case the bottomry right is said to have arisen after the capture of the ship. According to the opinion of the Court of Appeals, however, this

⁸⁵A vessel insured under a time policy was captured by the English and a prize crew put on board. In the course of the voyage to an English port, fires broke out in the bunkers, and the vessel was destroyed. It did not appear that the fire was attributable to the negligence of the prize crew. It was held that the insurance was payable. The owners had an insurable interest at the time of loss, as under English law, which applies in the case at bar, the owners' rights are not terminated until adjudication in a prize court, and no evidence of such adjudication was introduced. The Catharina, Oberlandesgericht, Hamburg, 5th July, 1916, Deutsche Juristen Zeitung (1917) 249; Imperial Supreme Court, 13th January, 1917, Deutsche Juristen Zeitung, (1917) 432.

⁸⁶Schaps, Rechtsprechung der deutschen Prisengerichte, Juristische Wochenschrift (1915) 1164.

⁸⁷Superior Court of Prize, 17th December, 1914.

makes no difference in adjudging such bottomry right, since under prize law it is void as against the legal effect of seizure. The same is true of an alleged bottomry creditor in his capacity as citizen of the Empire. It is not evident why an exception should be made to the above mentioned principles in favor of citizens of the Empire.

ILLEGAL CAPTURE.

Art. 8 of the Prize Code provides that damages are recoverable for an illegal capture or seizure, unless there were sufficient grounds to justify the action of the captor. The law presumes such grounds to be sufficient in case of spoliation of ship's papers or similar irregularities. In *The Hasenkamp*,⁸⁸ the vessel was released, but damages were refused on the ground that the names of four persons on the crew list did not correspond with the names of persons on board. In *The Dahlia*⁸⁹ the absence of entries in the log-book regarding previous voyages was regarded as a suspicious circumstance, and as justifying capture. But the mere fact that the vessel emitted dense smoke does not justify capture for unneutral service.⁹⁰

In *The Pass of Balmaha*⁹¹ a claim by the neutral owners of the cargo for damages was rejected because, first, the vessel was held to be an enemy vessel, and second, the goods were consigned to the order of the consignors, and documents were found on board indicating a sale to Russian cotton mills, but not indicating that the sale was on credit.

Where the cargo of a neutral vessel contains conditional contraband amounting to more than one-half of the total cargo in weight, and the shipments were to order, and there was some discrepancy in the designation of consignees in the manifest and in the bills of lading, the captor had reasonable grounds for sending in the vessel for adjudication, and the owners are not entitled to damages.⁹² So also the commander may take a vessel to port for examination, where an examination at sea presents special difficulties.⁹³

⁸⁸Hamburg Prize Court, 18th February, 1915, affirmed on appeal.

⁸⁹Superior Court of Prize, 29th June, 1916.

⁹⁰*The Lisbeth Betty*, Superior Court of Prize, 29th June, 1916.

⁹¹*Supra*, footnote 80.

⁹²*The Norden*, Hamburg Prize Court, 8th December, 1916.

⁹³*The Star*, Superior Court of Prize, 25th November, 1915.

The conduct of the commander is judged by an objective standard.

According to the view of the Prize Court there were sufficient grounds for the seizure in all of the cases before the Court. In the determination of this matter regard cannot be had to the facts as they appeared after the circumstances were more fully examined and the testimony of experts admitted. The determining factor is whether at the time of the seizure, looking at the facts from the viewpoint of the commander ordering the same, there were, objectively considered, sufficient grounds for the capture of the vessel and the seizure of the cargo. The cases mentioned in art. 8 (1) and art. 13 (c) and 14 (c) of the Prize Code are merely examples * * * It may be that there were not sufficient grounds for the seizure even though the commander subjectively was of the opinion that such grounds existed. In all cases the standard to be applied is whether a careful commander, judged by an objective standard, would after investigation have been justified in regarding the grounds of the seizure as sufficient.⁹⁴

The question of the measure of damages in case of illegal capture arose in *The Sydney Albert*:⁹⁵

The Prize Code has not determined the manner of estimating damages in case of illegal capture. The article of the Prize Code in question is an almost literal reproduction of art. 64 of the Declaration of London of February 26, 1909, regarding naval warfare. According to the Explanatory Memorandum annexed to the Declaration (par. 4) the question whether a distinction was to be made between remote and proximate damages to the vessel and cargo was discussed in the Conference. It was, however, deemed expedient to give to the prize courts free scope in the assessment of damages which would vary according to circumstances, and the amount of which should not be too minutely determined in advance by hard and fast rules.

According to international practice, as followed in numerous cases since the decision of the Geneva Tribunal in the Alabama Claims (20 Martens, Nouveau Recueil, 728, 774) in claims for damages

⁹⁴The Belle Ile, Kiel Prize Court, 6th January, 1915, reversed on other grounds, Superior Court of Prize, 6th July, 1915.

⁹⁵Superior Court of Prize, 25th November, 1915.

sustained by the nationals of a state and for which another state is made answerable, claims for injuries only remotely arising out of the illegal acts or the loss of future profits, of a more or less hypothetical nature, are not considered. The same rule must be adopted in estimating damages under the law of prize.⁹⁶ In the proceedings at the London Conference, this point was emphasized by the German delegation, without contradiction, although it was added that prize courts should not apply this principle with too great severity.

In the case at bar, the claim for damages made by claimants, and which was approved with certain modifications by the trial court, included the prospective profits the vessels would have earned in fishing voyages during the time she was detained in Hamburg. The making of these voyages, and the resulting profits were, however, dependent upon so many contingencies that they cannot serve as a basis for estimating damages. The Superior Court of Prize declines to revise the several items of the claim. In view of the fact that unquestionably certain damages are proximately caused by the enforced idleness of the vessel, the court rejecting the appeal of the claimants, has fixed, in the exercise of its discretion, on an amount set forth in the decision, which amount includes the cash expenditures of the claimant. Interest is due only from the date of the enforcement of the liability for damages. The costs below and on appeal are imposed on the Empire, because the assessment of the amount of damages was in the discretion of the court.

In estimating damages for the illegal capture of a vessel, the terms of the charter, and the size and age of the vessel may be considered.⁹⁷ In all cases it is the value at the time of capture.⁹⁸

In *The Thorsten*, the Kiel Prize Court⁹⁹ rejected a claim for damages set up by a passenger for loss occasioned by the delay. Whether a claim of this character can be entertained by a prize court was not decided as the court held that in the particular case the capture of the vessel was justified.

⁹⁶The amount recoverable is thereby kept within narrow limits. Buresch, *Prisenrecht und Prisengerichtsbarkeit*, Deutsche Juristen Zeitung (1916) 471, 474.

⁹⁷The *Elida*, Kiel Prize Court, 23rd February, 1916.

⁹⁸The *Kiew*, Superior Court of Prize, 28th June, 1916.

⁹⁹Cited by Schaps, *Rechtsprechung der deutschen Prisengerichte*, Juristische Wochenschrift (1915) 1164.

CONTRABAND.

The lists of contraband contained in the Prize Code at the time of its promulgation were identical with those set forth in the Declaration of London, arts. 21 and 24. Since that date the lists have been amended from time to time,¹⁰⁰ the last revised lists being set forth in the Ordinance of June 25, 1917, as amended by the Ordinance of January 18, 1918.¹⁰¹

In view of the detailed manner in which the objects declared contraband are set forth, the contraband lists must be given a strict interpretation.¹⁰² Where there has been a change in the list of contraband, the vessel is not liable unless affected with notice of such change. In determining this question, the circumstances set forth in art. 45 of the Prize Code may be taken into consideration, but do not announce presumptions.¹⁰³

In determining whether particular articles are to be regarded as contraband, the court may take into consideration the existing economic conditions as indicating a probability that the goods are ultimately destined for the use of the enemy government.¹⁰⁴

Where it is charged that the contraband carried is in excess of one-half the value of the entire cargo, it is the value of the goods at destination, not their value in Germany, that determines the question.¹⁰⁵

The fact that goods were consigned in small lots to retail dealers is important but not conclusive.

It is clear that the strictest requirements of proof must be made in order to overcome the presumption because nothing is more simple than the use of a non-military but false name of consignee. It is well known that army contractors frequently purchase the goods required by them from retail dealers; it is furthermore not impossible that the retail dealers, upon receipt of the goods claimed, would have sold the

¹⁰⁰Prize Code, arts. 22 and 24 provide that the lists of contraband may be extended. It is immaterial how these additions are made—whether by statute, ordinance, or otherwise. The *Elsa* (Barque), Superior Court of Prize, 13th August, 1915.

¹⁰¹The lists of contraband as set forth in the Ordinance of 25th June, 1917, [Reichsgesetzblatt (1917) 554], as amended 18th January, 1918, [Reichsgesetzblatt (1918) 43], are set forth with some annotations in an appendix to this article.

¹⁰²The *Storesand*, Superior Court of Prize, 26th April, 1917; The *Jeanne*, Hamburg Prize Court, 6th July, 1917.

¹⁰³The *Elsa* (Barque), Superior Court of Prize, 13th August, 1915.

¹⁰⁴The *Laila*, Hamburg Prize Court, 4th November, 1915.

¹⁰⁵The *Berkelstroom*, Hamburg Prize Court, 6th January, 1917.

same to the canteens of the military depots, *etc.* It may furthermore be assumed that in view of the general scarcity of food prevailing in France as in other countries, the state would have seized the foodstuffs upon their arrival in Bordeaux and would then have used the same for the army either to the exclusion of or jointly with the civilian population, just as in Germany this is done through the Central Purchasing Agency.¹⁰⁶

The quantity of particular goods may be an important factor in determining whether the same are destined for the use of the military forces of the enemy.¹⁰⁷

In general, the claimant must produce evidence showing that in the ordinary course of events the goods will not be used for enemy purposes.¹⁰⁸

ENEMY DESTINATION.

The Prize Code in the form in which it was originally promulgated followed the Declaration of London as to the rules governing enemy destination of contraband. It authorized the commanders to regard the ship's papers as determining the destination of the vessel, unless there was deviation. If, however, the papers did not fix the destination, or permitted the vessel to enter an enemy port or to unload the cargo at such port, the commander was authorized to presume an enemy destination.

By the Ordinance of April 18, 1915,¹⁰⁹ art. 33 was amended so as to provide that enemy destination of conditional contraband is to be presumed:

(a) When the goods are consigned to an enemy authority or the agent of such, or to a dealer shown to have supplied articles of the kind in question or products thereof to the armed forces or the administrative authorities of the enemy state.

(b) When the goods are consigned to order, or the ship's papers do not show who is the consignee, or the goods are consigned to a person in territory belonging to or occupied by the enemy.

¹⁰⁶The *Niobe*, Hamburg Prize Court, 9th March, 1917.

¹⁰⁷Where only small quantities of coffee (30 sacks) were on board, it is not improbable that no further export was intended from Sweden. The *Corfiz Beck Friis*, Kiel Prize Court, 23rd February, 1916. But 200 sacks of onions were regarded as such a quantity as to raise a contrary presumption. The *Luise*, Kiel Prize Court, 24th February, 1915.

¹⁰⁸The *Iyden*, Kiel Prize Court, 15th December, 1915.

¹⁰⁹Reichsgesetzblatt (1915) 227.

(c) When the goods are destined for a fortified place of the enemy, or to a place serving as a base of operations or supplies of the enemy forces.

Paragraph (b) indicates the beginnings of the adoption of the doctrine of continuous voyages in the case of conditional contraband.

A further extension of the doctrine is seen in the Ordinance of July 22, 1916.¹¹⁰ Amending art. 30, this Ordinance provides that proof of the destination of absolute contraband shall be deemed complete, in addition to the cases set forth in the article as originally adopted, in all cases where, regardless of the port of destination, the goods are consigned to order, or the ship's papers do not show who is the consignee, or the goods are consigned, directly or indirectly, to a person in territory belonging to or occupied by the enemy, or to a person who during the present war has directly or indirectly supplied contraband to the territory belonging to or occupied by the enemy or to the administrative authorities of the enemy state or the agents of such authorities.¹¹¹

Art. 33, relating to conditional contraband, as amended by the Ordinance of April 18, 1915, has also been changed so as to conform to the provisions relating to absolute contraband.

Through these amendments the doctrine of continuous voyage has received a more extended application. Under the old rule, contraband consigned to a neutral port to order or to a munitions firm was not subject to condemnation unless the evidence showed that it had in fact an enemy destination. The burden of proof is now on the claimant to show innocent destination.¹¹²

In all cases, the point is not the destination of the vessel, but the destination of the particular cargo. Therefore, it is the person who in fact is to receive the goods at the end of their transportation who must be shown to be unquestionable.¹¹³

Art. 40 was amended by the Ordinance of April 18, 1915,¹¹⁴ so as to provide that a vessel shall be liable to condemnation for

¹¹⁰Reichsgesetzblatt (1916) 773.

¹¹¹In *The Corfiz Beck Friis*, *supra*, footnote 107, it was said that the fact that the claimant is engaged in the sale of war materials to the enemy is not, of itself, sufficient to raise the presumption that all of his business dealings are with the enemy.

¹¹²Lindemann, *Feindliche Bestimmung der Kriegskonterbande* 90 *et seq.*

¹¹³*The Vega*, Superior Court of Prize, 17th February, 1916; *The Loke*, Kiel Prize Court, 6th October, 1915; *The Artemis*, Kiel Prize Court, 6th October and 24th November, 1915.

¹¹⁴Reichsgesetzblatt (1915) 227.

the carriage of contraband on former voyages, if she carried such contraband contrary to the indication of her papers.

In the consideration of the decisions under these sections the changes in the law indicated above must be kept in view.

The leading case on the question of enemy destination is the *Maria*,¹¹⁵ decided under the law as originally enacted.

The assumption of the commander of the *Karlsruhe* that the entire cargo of the *Maria* was destined for Belfast did not agree, it is true, with the facts, the larger part being destined for Dublin. The judge of the lower court did not enter into the question whether Dublin too, was a place of the kind named in Art. 33 c, d, of the Prize Code at the time when the *Maria* was expected there; he declared it sufficient that the ship was to have first called at Belfast, to which place at all events those provisions of the Prize Code referred, and that therefore the portions of the cargo destined for Dublin were also first directed thither. Whether this holding should be concurred in need not be considered, since in the meantime an official declaration has been received from the Chief of the Admiralty Staff, according to which, since the beginning of the war, Dublin also has served as a base of operations and supply for the English forces. Thus the legal presumption of the enemy destination of the goods is supported.

It has been repeatedly decided, and therefore needs no further argument, that the presumptions set up in the Prize Code shall be given effect in judicial decisions. It therefore need only be considered whether the claimant has succeeded in rebutting this presumption. The lower court decided that the proofs submitted were insufficient, since even if the original intention had been to sell the wheat to mills operating for private persons, it could not be positively established to what use the wheat would actually have been put upon arrival in Belfast and that the English Government would not gladly have purchased it and at a high price, especially since the bill of lading was made out simply to order. This the claimant opposes, stating that the point is, not what would possibly have become of the cargo, but whether its destination was an enemy one; if this be not acknowledged, the proof, which is allowed in rebuttal of the presumption, would become an impossibility.

¹¹⁵Hamburg Prize Court, 17th April, 1915, affirmed by Superior Court of Prize, 5th October, 1915.

This contention is not correct. It is true that if only the wording of Arts. 32 and 33 of the Prize Code be considered, it might appear as if all questions had to be considered as of the time of seizure. Conditional contraband is, according to those sections, liable to seizure upon proof that it is destined for the enemy forces and such a destination is to be presumed when the facts stated in Art. 33 are given. It must not be taken from this, however, that the presumption applies only to the time of the seizure, and that the proof in rebuttal is to be considered as sufficient when it is shown that at the time of seizure the goods did not have an enemy destination. It was proper and necessary thus to express the rule in the Prize Code because it is in the form of instructions to the commanders of men-of-war, who are only called upon to take into account the facts existing at the time of seizure. Pending the decision of the prize court, however, a certain time must naturally elapse, and in consequence, the instructions can have only a corresponding application, as is immediately apparent when the Declaration of London is taken into consideration. It is impossible to admit that the court is bound to leave subsequent happenings out of consideration, as for instance, a sale of the cargo to the enemy forces after capture and in ignorance of the same, or to consider the consignment of the cargo to a notorious army contractor as innocent because it was proved that at the time of seizure he had not yet resold the same to the government.

Art. 33 of the Prize Code gives as the ground for the presumption of the place of destination, the address to which the shipment was originally consigned; the content of the presumption, however, has nothing to do with the address, but refers to the real destination, the destination for the use of the enemy forces. If the place of destination exists, this is taken as proof of the real destination. Proof in rebuttal, it is true, may be offered, but it is not sufficient to prove that at the time of seizure the aforesaid disposal of the goods had not yet been made; for just as in cases in which the legal presumption does not come into operation and the proof of the hostile destination is not confirmed to facts which had already occurred at the time of seizure, so the content of the presumption can likewise not be subject to such a restriction. Otherwise, it would be most easy to avoid the seizure of conditional contraband by abstaining from giving the goods in the

first instance any but a purely local destination. Whether or not proof in rebuttal may be submitted can only depend on consideration of the facts of each individual case. It also depends on the kind of cargo, and how important under existing circumstances it might be for the armed forces of the state and, consequently, upon the probability that the enemy government would acquire it. In the prize cases of *The Alfred Hage*, *The Havsoe*, etc., the court declared the presumption rebutted because proof was submitted which established that the cargoes, consisting of pit-wood, were actually sold on the spot where they were required and would there be used and consumed, and the court could not but hold that the cargoes would have been actually used by private persons as intended. The present case is essentially different. The only actual fact is that at some time before the outbreak of the war the wheat was sold and shipped to an English importer. As to the rest, there were brought forward only assurances of the purchasers that they were not army contractors or anything of the sort, and that it was their intention to sell the wheat to mills in the neighborhood of their branches in order to meet their normal requirements. This may be taken as the literal truth, but it would still be absolutely uncertain where the wheat would in reality have gone, quite apart from the fact that after all the point is not where the corn is ground but for whom and for what the flour is intended.

In *The Modig*¹¹⁶ the Superior Court of Prize regarded the facts such as to show that the cargo (conditional contraband-coal) consigned to the municipal gas works at Helsingfors were intended for the sole use of the civilian population. The port of destination in Raumo, was a naval base of the Russian torpedo fleet, according to the official statement of the Chief of the Admiralty Staff, and therefore the presumption of warlike use arose. The court held further that to overcome this presumption it was not sufficient to prove that at the time of the capture the goods had not been sold to the enemy forces or administrative authorities, but that it must be shown that in the ordinary course of events such uses were not probable. This, it was held, would generally be the case where the private consignee is also the consumer. Where coal is used by a gas work, its further warlike use was excluded. The mere fact that the cargo might be subject to seizure by the government for

¹¹⁶5th October, 1915.

use for war purposes was too remote a contingency; the adoption of this view would render all articles designated as conditional contraband liable to condemnation.

The statements of the claimants that their intention was to devote the cargo only to civilian purposes are not in themselves sufficient to overcome the presumption.¹¹⁷ Nor are certificates of consular officers of neutral countries to the effect that the consignee does not stand in business relations with the enemy state sufficient evidence.¹¹⁸

In *The Laila*¹¹⁹ the Hamburg Prize Court cast doubts on the value as evidence of affidavits, but the Superior Court of Prize in *The Elna*¹²⁰ has recognized affidavits as evidence.

The Norwegian vessel *Semantha* sailed with a cargo of wheat, from Portland, Oregon, to Queenstown, Falmouth, or Plymouth for orders, and was captured and sunk by a German cruiser. It was held that while under Prize Code, art. 33 (d), before its amendment, the presumption of hostile destination did not arise yet art. 37 (2) provides that if the ship's papers contain no specific destination for the goods, the captor may assume their destination to be any port which the vessel must or may touch. It being shown that the English ports named were military bases, the cargo was condemned.¹²¹

On the other hand, where a vessel is still to go to other neutral ports for taking on cargo, and the bill of lading read "via other loading ports," there is no presumption of the vessel going to enemy ports, such as arises where the bills of lading read "via other ports."¹²²

A conditional destination is sufficient. In *The Helikon*¹²³ the circumstances were held to show that the vessel which left England with coal before the war for a Chilean port, and had put into Port Adelaide for repairs, left the latter port on the 10th September, with orders to deliver the coal to English war vessels in case she should meet such on her voyage to Chile. This conclusion

¹¹⁷The *Maria*, Superior Court of Prize, 5th October, 1914; The *Sigurd Hund*, Hamburg Prize Court, 4th November, 1915.

¹¹⁸The *Luise*, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915.

¹¹⁹4th November, 1915.

¹²⁰4th April, 1916.

¹²¹The *Semantha*, Superior Court of Prize, 6th October, 1916.

¹²²The *Norefos*, Superior Court of Prize, 6th July, 1915.

¹²³Hamburg Prize Court, 4th November, 1914, Reversed on its facts, Superior Court of Prize, 17th November, 1916.

was arrived at by the fact that the owner of the cargo was known to be one of the most active supply agents of the English navy, and that the route chosen by the vessel was an unusual one. It is immaterial whether the consignor or the consignee determined the ultimate destination.

In *The Kiew*,¹²⁴ claimants pleaded that the goods were diverted to England against their will by the shipowner who did so in fulfillment of an obligation incurred towards the British authorities. In denying the claim the court said:

The ultimate aim of all regulations as to contraband is to prevent the prohibited articles from reaching enemy territory and the fighting forces of the enemy * * * The goods must have been brought consciously and deliberately on the way to enemy territory, and this is the case even if the shipowner acting arbitrarily in the matter should order them to be thus sent * * * The assumption of the law that the consignment was addressed to an enemy authority does not hold good any the less, because that authority is the British Prize Court. The special legal position of this Court can only be considered in so far as it is constituted without any doubt an authority. It may be granted that it has nothing whatever to do with the equipment and supplies for the British forces. This, however, does not affect the matter. Since the goods were to be placed at the disposal of the British Prize Court there is according to art. 33 a of the Prize Code every justification for assuming that the goods were destined for use by the armed forces or the administrative service of the enemy state, and it is incumbent on the claimants to refute this presumption.

It was further held that the case did not come within art. 98, relating to recapture. Recapture implies an original taking by military force. A mere constraint, as for example, alteration of course or entry into an enemy port for examination, is not enough. The intent or knowledge of the neutral consignor does not affect the case. Even where the consignee is the agent of the consignor, it may be that the consignee, without the knowledge of the consignor, has destined the goods to a warlike use. The ownership is not decisive, but the destination intended by the person having the control of the cargo is.¹²⁵ The fact that the goods were sent

¹²⁴Superior Court of Prize, 9th February, 1917.

¹²⁵The Kiew, Kiel Prize Court, 21st June, 1916.

on consignment is immaterial.¹²⁶ But a merely supposed enemy destination does not justify condemnation.¹²⁷

The information officially given by the Chief of the Admiralty Staff as to what places are fortified or serve as naval bases or as bases of supplies, while not binding on the prize courts, is regarded as convincing testimony upon these points.¹²⁸ The courts will take judicial notice of the fact that London, as the center of the political and commercial activity of England, is a military base.¹²⁹

The presumption of enemy destination arises in all cases where the shipment is "to order."¹³⁰ This point frequently comes up in connection with shipments consigned to one or the other of the import trusts, such as the Netherlands Overseas Trust. In *The Lupus*,¹³¹ it was held that the consignee was held to strict proof to overcome the presumption of enemy destination, especially in view of the strong British influences in the management of the Netherlands Overseas Trust.

But the presumption may be overcome by the fact that there is a prohibition of export of the particular commodity from the country to which it is consigned,¹³² or by the fact that the goods in question were exported under license from the enemy country.¹³³

¹²⁶The Medea, Hamburg Prize Court, 13th August, 1915.

¹²⁷The Zaanstroom, Hamburg Prize Court, 1st June, 1915.

¹²⁸The Zaanstroom, *supra*, footnote 127; The Maria, Hamburg Prize Court, 17th April, 1915.

¹²⁹The Zaanstroom, *supra*, footnote 127.

¹³⁰A shipment to a named person "or his or their assignees" is a shipment "to order." The Embla, Kiel Prize Court, 15th December, 1915.

¹³¹Hamburg Prize Court, 27th April, 1917.

¹³²The Harald Haarfager, Kiel Prize Court, 4th July, 1917.

¹³³The Lestris, *supra*, footnote 82. The court said:

According to Prize Code arts. 23, 33 (a) and 35 (a) enemy destination must be suspected even if the ship is on her way to a neutral port, if consigned to order or to a consignee whose name cannot be found in the ship's papers. In this case the *premier jus* was consigned to the Netherlands Overseas Trust for the account of the Margarine Works, formerly Cohen & Van der Laan, Haarlem, or order. Both the above requirements have been fulfilled, therefore, as by the consigning of the goods to the Trust the real consignee could not be seen from the ship's papers. Meanwhile, the legal suspicion of enemy destination has been overthrown by the circumstances of the case. As appears from the export licenses produced with the documents, the English Government granted the export of the parcel of *premier jus* to Holland. Although the Trust is entitled, as is known to the Prize Court, by the contract signed by the importer for every import into Holland to send back goods imported into a Dutch port, to a port of a country which is at war on examining the ship's papers, the supposition that this could also be applied if the export from the enemy country took place on approval of the country concerned is too far fetched to be considered seriously. In such a case, the belligerent country has power by

UNNEUTRAL SERVICE.

The provisions of the Prize Code, arts. 48-56, relating to unneutral service, were originally identical with those contained in the Declaration of London, arts. 45 and 46. A sweeping modification was made by the Ordinance of July 16, 1917,¹³⁴ which amended par. (c) of art. 55, so as to provide that a neutral vessel shall be regarded as rendering unneutral services to the enemy:

If she is chartered by the enemy government or is navigating in the interest of enemy warfare.

Unless the facts show to the contrary, a vessel shall be regarded as navigating in the interest of enemy warfare when voyaging from or to enemy territory or territory in the occupation of the enemy under charter to an enemy subject or to a person residing in an enemy country or to a person shown to have rendered services as an agent for an enemy government during the present war.

SEIZURE OF NEUTRAL CARGO ON ENEMY VESSELS.

Art. 110 of the Prize Code provides:

In case of need, H. M. ships, and the war vessels of an allied state and captured vessels, may take portions of the cargo, equipment and stores of captured enemy vessels to supply such needs, in so far as the goods taken are not unquestionably neutral property.

In *The Indrani*,¹³⁵ bunker coal and other coal carried as cargo on an enemy vessel was taken by the captor. It was afterwards shown to be neutral property and compensation was allowed.

DESTRUCTION OF VESSEL AND CARGO.

Regarding enemy vessels, art. 112 of the Prize Code provides.

The commander may make use of an enemy vessel captured * * * as an auxiliary vessel, or if the bringing in of the vessel appears to him to be inappropriate (*unzweckmässig*) or unsafe, to destroy the same.¹³⁶

refusing an export license to attain directly, and with greater certainty, the end pursued by the agreement with the Netherlands Overseas Trust. Therefore, it must be admitted that the *premier jus* on reaching Holland would have remained there.

¹³⁴Reichsgesetzblatt (1917) 631.

¹³⁵Hamburg Prize Court, 3rd July, 1915. See also art. 9, providing that: The commander may not, without the consent of the parties interested, requisition a vessel or goods not subject to capture or seizure, even if payment is made.

¹³⁶See also art. 1.

There is here no question of compensation for the vessel.¹³⁷ As enemy goods on board an enemy vessel are subject to condemnation,¹³⁸ and may be destroyed,¹³⁹ there is also no question of compensation as to such cargo.

A more difficult question arises as to neutral cargo on board such vessels.¹⁴⁰ The leading case is *The Glitra*,¹⁴¹ where the Superior Court of Prize affirming the decision of the Hamburg Prize Court¹⁴² held that the neutral owners were not entitled to compensation.

The question is whether in the case of the legal destruction of a hostile ship, compensation is to be made for the goods of neutrals which are lost with the ship. It is clear that an express instruction upon this point is contained neither in the Prize Code nor in the Declaration of London. But the Prize Code does not state anything about it even indirectly. The claimants seek to find such an instruction in art. 114 of the Prize Code. The judge of the lower court was right in rejecting this contention, even if his reasons are not always to be agreed with. The commander is therein instructed, before he decides upon the destruction of a ship, to consider whether the injury to be done to the enemy balances the compensation to be paid for the destruction of the innocent portion of the cargo. At the same time reference is made in brackets, amongst other things, to art. 18, which deals with the capture of hostile ships and directs what portion of the cargo is likewise liable to seizure. This indeed conveys the idea that the compiler of the Prize Code takes in art. 114 the standpoint that even in the case of the destruction of a hostile vessel indemnity is to be paid for the innocent portion of the cargo. It must also be admitted that this reference confused the holding of the lower court, if it presumed that art. 114, as well as the preceding and following regulations, refer only to the destruction of neutral ships. Nevertheless, the importance which the claimants

¹³⁷The *Glitra*, Superior Court of Prize, 17th September, 1915; The *Indian Prince*, Superior Court of Prize, 15th April, 1916.

¹³⁸Prize Code, arts. 18, 19.

¹³⁹Prize Code, art. 120.

¹⁴⁰Art. 120 of the Prize Code provides: If the commander releases a captured enemy vessel (see art. 112), or determines not to proceed to a capture, such portions of the cargo as are subject to seizure under articles 19 and 56 may be destroyed.

¹⁴¹17th September, 1915.

¹⁴²29th January, 1915.

seek to attach to it cannot be given to this paragraph. Interpreted according to their contention, it would to a certain extent contradict what the Prize Code prescribes in the paragraph immediately adjoining. As is clearly shown there, the Prize Code does not prescribe that compensation is to be granted in every case for the destruction of goods not liable to seizure, since in the case of the legal destruction of a neutral ship compensation is only prescribed for the destruction at the same time of innocent goods, in so far as they are neutral goods, but not for hostile goods, which, under the protection of the neutral flag, are likewise not liable to seizure. In addition, there are also hostile vessels which are not liable to capture, and therefore are not to be seized; so that if by chance,—for instance, on account of a pardonable error—such a vessel should nevertheless be destroyed, the question might arise whether on account of the compensation to be paid for values destroyed with it, a distinction should not be made between neutral and hostile property, for which reason it might seem advisable to instruct the commanders of men-of-war to take into account such considerations as are laid down for them in art. 114. Above all, it is of paramount importance that art. 114 be not *sedes materiae*, and therefore, even supposing that the compiler of the Code was of the opinion that in the case of the legal destruction of a hostile ship, claims for compensation could be sustained for neutral goods, it would be incorrect to regard his opinion as a definitive decision of this at least doubtful, and at any rate disputed, but still open question.

As Wehberg, correctly points out, Heilfron goes too far when he wishes to give to the Prize Code the importance only of a command given by the Kaiser to the commanding officers of the navy. The Prize Code contains to a great extent substantive law. But with regard to the precise question under dispute, Heilfron's characterization is correct. This article (114) is indeed only a command to the commanders of men-of-war. The Commander-in-Chief but not the legislator speaks. He does not desire to make substantive law and does not do so.

Thus obliged to revert to the most general legal principles in connection with the general laws of war, it is absolutely evident that a claim in favor of the neutrals does not exist, if the destruction of the prize was justified by the circumstances. (Art. 112, Prize Code.)

The seizure and capture of hostile ships is an admissible act of war against other states which is sanctioned by international law. Claims for compensation either from members of hostile or neutral states cannot arise in every case. It is true that according to art. 3 of the Declaration of Paris, neutral property (which is not contraband) cannot be seized even on hostile ships. Therefore, it is not even liable to seizure if the ship is brought into port. But there can be no question of the parties interested in the cargo having a claim for compensation on account of the injury caused by the seizure of the ship, the interruption of the voyage, or the conveyance to a different destination than the one intended. There is also just as little claim for compensation if the goods themselves suffer injury in consequence of the seizure of the ship; for instance, if on account of an accident they are lost during the subsequent voyage of the prize. Since seizure is a legal act, there is no legal basis whatever upon which to found an injury to the goods, which the neutrals have, moreover, themselves caused by entrusting their property to an endangered ship. Therefore, since seizure is a legal act of war, there is no legal basis for establishing the injury to the goods, even if they are lost through an act of war directed against the ship when owing to the circumstances such an act must necessarily also be directed against the cargo.

The legal question which here arises can also arise under the conditions of land warfare. It can and frequently does happen, for instance, during the bombardment of a fortified or defended place, that the property of neutrals also suffers injury. But even in land warfare, in which private property is much more protected than in war at sea, there can be no question in such a case of a liability on the part of the belligerent states to indemnify the neutrals. Compare Article 3 of Convention IV of the Second Hague Conference; Geffcken by Heffter, *Völkerrecht*, Sec. 150 note 1 (incorrect, at least insufficient, *viz.*, the text by Heffter); Calvo, *Droit international*, IV, 2250-2252; Bonfils, *Völkerrecht* 1217; Bordwell, *Law of War* 212.

In regard particularly to the conditions of naval war, however, art. 3 of the Declaration of Paris gives protection neither in general nor specifically to neutral property against the actions of the belligerents due to the necessities of war. The purpose of art. 3 of the Declaration of Paris was to extend protection

to neutral property in an enemy ship which, under the prize law as it existed prior to the Declaration, was subject to capture. What the necessities of war demand must be allowed to take place, whether neutral property is on board the ship or not. If, according to art. 2 of the Declaration of Paris, the neutral flag protects enemy property, this does not mean, that, *vice versa*, neutral property protects the enemy ship, and protects it, indeed, not only against destruction but also in many cases against every exercise of prize law.

As far as can be seen up to the most recent time, no one has ever disputed this holding. Compare, Decision of French Conseil d'Etat of May 21, 1872, in III Dalloz, Jurisprudence générale (1871) No. 94, in the prize case of *The Ludwig and Vorwaerts*; Dupuis, *Le droit de la guerre maritime*, (1899) 334; de Boeck, *de la propriété ennemie privée sous pavillon ennemie*, § 146; Bordwell, *Law of War* 226; Wheaton, *International Law*, 4th ed., 507, § 359e; II Oppenheim, *International Law* 201 *et seq.*; V. Calvo, *Droit international* 3033, 3034; Hall, *International Law*, 5th ed., 717 *et seq.*

The claimants' assertion that the decision of the French Prize Court in the case of *The Ludwig and Vorwaerts* was almost universally attacked in literature, has, apart from the quotations from the recent literature (Wehberg and Schramm; the quotation from Hall, p. 187, see above, is incomprehensible) remained unproved and must be regarded as incorrect. Only very recently, especially in Germany, has there developed the theory that generally in the case of the destruction of innocent goods the highest principle prescribes the obligation of granting compensation absolutely or in so far as innocent goods may have been destroyed, and absolutely or in so far as neutral goods may have been destroyed. Compare, Schramm, *Prisenrecht* 338 *et seq.*; Wehberg, *See-kriegsrecht* 297, notes 3 & 4, and Österr, *Zeitschrift für öffentliches Recht*, II, 3, p. 282; Rehm, *Deutsche Juristenzeitung* (1915) 454.

In consequence the general obligation of granting compensation is regarded as a foregone conclusion, without giving any reason to support it, and when it is subsequently attempted to bring forward a reason, it does not, when compared with the foregoing arguments, appear convincing. Even the argument that land warfare must be confined locally to the territories of the belligerents while the ship may

sail over the wide seas, cannot alter the finality of the latter conclusion. An enemy ship is subject to attack and eventually to defeat everywhere on the high seas in conformity with the perhaps regrettable, but nevertheless, valid state of international law. Finally, as soon as a ship enters the high seas, she becomes a portion of the territory of her state, into which the neutral having loaded his goods on board a belligerent vessel for the purpose of conveying them over the sea, has brought them of his own free will.¹⁴³

The view announced in *The Glitra* is not opposed to the provisions of arts. 9 and 110 of the Prize Code, as these deal merely with the requisition of the cargo, not with its destruction.¹⁴⁴

The decision in the *Glitra* case was followed in *The Indian Prince*.¹⁴⁵

The court which pronounced judgment in the *Glitra* case decided that if an enemy prize be legally destroyed, compensation is not due for neutral property on board the vessel and destroyed with it. This must also be maintained in regard to the counter-statements brought forward. According to general principles, a claim does not arise if the act through which the cargo was injured was not illegal, but legal, nor is any basis for a claim to compensation afforded by a positive instruction of the Prize Code. This also applies to art. 110 of the Prize Code in connection with art. 9, to which the claimants have referred. For, however correct the conclusion may be that since the captain is not entitled to take neutral property off enemy ships in order to use it, he is certainly not entitled to destroy it unused, nothing is gained for the matter which is here in question. The question here is, whether the commander is compelled by international law to refrain from sinking an enemy vessel when he has a legal right to do so, because its destruction would mean the loss of the neutral goods on board, especially if it is impossible for him to bring the vessel in. After repeated examination, the court must continue to answer this question in the negative. In this respect reference can only be made to the former decision. In particular it is incorrect to say that the former decision was based on the fact that, by shipping their goods in an enemy vessel, the shippers took the risk of capture and destruction,

¹⁴³ Accord, *The Durward*, Hamburg Prize Court, 3rd July, 1915.

¹⁴⁴ *The Bowes Castle*, Hamburg Prize Court, 3rd July, 1915.

¹⁴⁵ *Supra*, footnote 137.

and therefore could not claim compensation. On the contrary, in taking a general view of the matter, the expression to the effect that the neutrals had the free choice whether they would entrust their goods to the enemy ship and run the risks in connection therewith, is only used in order to show that the denial of compensation is correct not only from a legal point of view, but also cannot be considered as unreasonable.

The principal reason which is decisive of the case in question lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship legally committed according to prize law. It cannot be seen why this principle, which is generally acknowledged and placed beyond doubt by the report of the drafting committee upon Article 64 of the Declaration of London, should apply only to the capture of a ship and not to its just destruction.

In *The Indian Prince* the question was further complicated by the provisions of the treaty between the United States and Prussia.

There remains, in consequence, only the question whether the plaintiff's claim is justified by the treaty of commerce between Prussia and the United States of North America. But this must also be answered in the negative.

Having regard to the practice which has been followed on both sides not only during the present war but also in previous cases, the principles of that treaty must also apply to the relations of the German Empire to the United States. As a matter of fact, however, this treaty contains nothing in favor of the claimants.

According to Article XII of the treaty of 1828, Articles XII and XIII of the former treaties of 1785 and 1799, and Article XII in the original form of 1785, are applicable. In this Article XII, the principle "Free ships make free goods" is agreed upon. While the treaties which the United States made at the same time with other states agreed upon the principle "enemy ships, enemy goods," an exception being made only for goods which were shipped before the outbreak of the war or within a certain period thereafter, the treaty with Prussia is silent on the question "enemy ships, enemy goods" and it appears doubtful from the treaty how this subject is to be understood. Prussia may have taken the

stand that neutral property should not be subject to confiscation even on enemy ships, and this might be presumed from the fact that not long afterwards the same principle was acknowledged in common law. In the negotiations with regard to the Treaty of 1785, as the claimants aptly point out, Prussia actually desired that instead of the sentence "enemy ships, enemy goods," suggested in the American draft, the opposite view, "enemy ships, free goods," be adopted. But the United States would not agree to this, and therefore nothing at all was settled upon this point. Thus the law as laid down by the treaty corresponded to the rules of the Armed Neutrality of 1780. Only the rule "free ships, free goods" is expressed in the treaty, while nothing is said about neutral goods on enemy ships. This has often been taken to mean that the confiscation of neutral goods on enemy ships would not be resisted. By long practice it had become the custom to consider the confiscation of neutral goods on board enemy ships as a concession to the belligerents, in return for which the inviolability of enemy goods on neutral ships is acknowledged.

This is precisely the standpoint which the authorities of the United States of North America took at the time of the celebration of the treaty of 1785 with regard to its interpretation. No less a person than the Secretary of State, Jefferson, who was himself interested in the conclusion of the Treaty of 1785, expressed himself in this sense when, in 1793, France, then at war with England, complained to the United States that England had captured French goods in American ships and that America had allowed it. In Jefferson's note of July 24, 1793, rejecting these complaints as unfounded, because according to international law (*Consolato del Mare*) enemy goods in neutral ships are subject to confiscation, which is only modified if the principle, "free ships, free goods" is provided by the treaty, it is stated:

"We have adopted this modification in our treaties with France, The Netherlands and *Prussia*, and therefore as to them, our vessels cover the goods of their enemies, and we lose our goods, when in the vessels of their enemies."

Although in the treaty with Prussia the principle "Free ships, free goods" only is agreed upon, the Secretary of State, Jefferson, immediately presumes that, in consequence, the principle "enemy ships,

enemy goods" also applies in the relations with Prussia.

The claimants, therefore, do not refer to Article XII, but to Article XIII of the Treaty of 1785 and 1799. They do not deny that if the French text be used, nothing can be gained for their point of view from this article. But they want to hold to the English text, in which a discrepancy occurs, from which they seek to infer that under all circumstances when the goods belonging to citizens of the United States of America are in question, even if the cargo be on board an enemy ship, compensation must be paid.

It is unnecessary to consider which of the two texts is competent, or how, if both are competent, a contradiction between them is to be solved, for even the English text leads to no favorable result for the claimants. In the first place, their reading is directly contradicted by the interpretation of the treaty adopted by the United States, as mentioned above, in the year 1793. But purely from a grammatical point of view, the reading of the English text adopted by the claimants is not admissible. Whilst the French text speaks of goods shipped "*à bord des vaisseaux des sujets ou citoyens de l'une des Parties,*" the English text does not read, as it should in a literal translation, "carried in the vessels of the subjects or citizens of either party," but reads "*carried in the vessels or by the subjects or citizens of either party.*" Accordingly, the claimants think that not only goods shipped on American or Prussian vessels, but goods shipped by American or Prussian citizens as well, regardless of what kind of vessels are employed, or even if they be shipped in enemy vessels, should be presumed to be synonymous with goods which *belong* to such citizens.

Of the latter goods, however, no mention is made in the treaty. The "carried by" does not refer to the property relationship but to the *person* who undertakes the shipment, who, however, is the ship-owner and not the shipper or consignee. The whole difference between the English and French texts amounts to the extension, that, in addition to the ships of the citizens of both states, special stress is laid in the English text on the vessels of the parties to the contract, the vessels of the states,—"*the vessels of either party*"; for the words "*of either party*" must refer to "*in the vessels*" if the latter expression is not to be totally unintelligible. It is charac-

teristic, that the text in Martens, *Recueil des Traités*, Supplement, II, p. 226, also contains the edition of the treaty furnished by the Interior Department and an independent translation from the English which was undoubtedly made soon after the conclusion of the treaty of 1799, in which the translator reproduces the wording exactly in this sense. The "elles même" in the turning on "d'elles même" can for grammatical reasons apply only to the "Parties contractantes" in whose own vessels goods are shipped.

Moreover, a different interpretation is impossible for positive reasons. Article XIII treats of contraband. In order to avoid disputes, which are likely to arise over the question whether goods are contraband of war or not, it was agreed that contraband likewise should not be subject to seizure. It is true that in case of necessity, contraband goods may be requisitioned upon payment of their value; they may also, should the necessities of war demand it, be detained for the time being, the owners to be paid for the damage sustained by the detention. These stipulations of Article XIII are mostly closely connected with the provisions of Article XII. While contraband is always excepted from the general principle "free ships make free goods," after that principle is laid down in Article XII for enemy goods in Prussian or American vessels, Article XIII enters into the exceptional case of goods shipped in such vessels which are contraband of war or suspected of being contraband. The provision concerning the treatment of the ships in question, according to which the master of a vessel stopped for carrying contraband to the enemy is to have the choice of delivering up the contraband articles and then proceeding unmolested upon his voyage, applies without doubt only to the ships of the parties to the treaty. It appears absolutely out of the question that the agreement was also meant to apply to an enemy ship carrying munitions, *etc.*, to its own belligerent country. It cannot have been considered that the belligerent who succeeded in capturing a ship with weapons and munitions should be obliged to pay compensation when it happened to be a citizen of the other state party to the treaty who undertook to send them to the enemy, or that the enemy vessel after it had given up the contraband should be allowed to continue its voyage unmolested.

If Article XIII of the Treaty of 1799 does not refer to contraband on enemy ships, it is self-evident

that nothing concerning the treatment of innocent goods on such vessels is laid down. The principle "enemy ships, free goods," applies also to the United States. Its validity, however, is not derived from any special treaty, but from common international law as laid down in the Declaration respecting Maritime Law adopted at Paris in 1856, which, according to the German Prize Code applies also to countries, like the United States, which did not agree to that Declaration. Likewise, in regard to the question whether in such cases as the one under consideration the owners of neutral goods are to receive compensation, the same principles must be applied towards the citizens of the United States as towards the subjects of other neutral countries. These principles are laid down in the *Glitra* case.¹⁴⁶

Kohler¹⁴⁷ denies all liability for the destruction of neutral goods on board an enemy vessel sunk within the war zone, but admits that in so far as the neutral property is not destroyed it must be restored.¹⁴⁸ The same view is expressed by Scholz¹⁴⁹ and by Strupp.¹⁵⁰

Nöldeke¹⁵¹ points out that neither the precedents nor the general principles of international law require compensation to be made. He states:

Such an obligation can at most arise only where the war vessel destroying the enemy vessel and the neutral cargo is guilty of a violation of law. The law of nations does not recognize the existence of a general principle that a state is responsible in damages where in the exercise of its rights it incidentally affects private rights. The provision of art. 53 of the Declaration of London which provides that in the case of the destruction of neutral ships, a liability for the payment of compensation of neutral cargo de-

¹⁴⁶Accord: The *Indrani*, Hamburg Prize Court, 3rd July, 1915.

¹⁴⁷Der *Lusitania*fall in *Lichte des Völkerrechts*, Deutsche Juristen Zeitung (1915) 538, 540. See also his article, *Der Lusitania-Fall*, in 9 *Zeitschrift für Völkerrecht* 179.

¹⁴⁸But no damages are recoverable for delay or for damage to perishable goods. Scholz, *Schadenersatz für Zerstörung von Prisen*, Deutsche Juristen Zeitung (1915) 765, 768.

¹⁴⁹*Op. cit.*, 765, 768.

¹⁵⁰Der *Lusitania*-Fall, 93-96. So also, Arndt, *Berliner Tageblatt*, 18th May, 1915. (evening ed.)

¹⁵¹Die Frage des Schadenersatzes für die Zerstörung neutraler Ladung mit feindlichen Schiff, 9 *Zeitschrift für Völkerrecht* 447, 453, 454. See also his article in *Hamburger Fremdenblatt*, 8th June, 1915. (evening ed.)

stroyed with the ship, arises without regard to the guilt of the war vessel, is an exceptional provision not susceptible of extensive interpretation by analogy * * *.

In reference to the provisions of the Declaration of Paris, Nöldeke says:

It must be taken into consideration that in 1856 the value of the cargo seized was the principal point at interest in the law of prize. The purpose of art. 3 was to prevent the enrichment of the belligerents at the cost of neutrals but not at the cost of the opposing belligerents. Therefore, the acquisition (*Aneignung*)¹⁵² of neutral goods was prohibited and the duty imposed upon the belligerent to pay over the proceeds of neutral goods sold by him to the interested persons. Under no circumstances was it intended thereby to interfere with military operations nor to require the belligerent to abstain from the sinking of an enemy ship where such sinking was a military necessity, by requiring him to have regard to the neutral character of a part or of the entire cargo. Furthermore, the Declaration of Paris does not prohibit an injury of neutral goods. From this viewpoint, therefore, no question can arise of the existence of a general rule granting immunity to neutral goods on board an enemy vessel. From this it follows further that a destruction of the cargo is permissible in all cases where the vessel itself may be destroyed, because a separation of the goods from the ship is impossible at that critical moment.

Heilfron¹⁵³ is of opinion that art. 114 of the Prize Code can give no right of compensation, because the entire Code is merely a set of instructions to naval commanders, issued by the Emperor in his quality as commander in chief,¹⁵⁴ and therefore incapable of imposing a liability on the state. He further argues that the Declaration of Paris, while protecting neutral goods in enemy vessels from seizure, does not protect them from destruction with the vessel.

Other German writers, such as Wehberg,¹⁵⁵ Schramm,¹⁵⁶

¹⁵²La marchandise neutre * * * n'est pas. saisissable sous pavillon ennemi.

¹⁵³Lusitania, Juristische Wochenschrift (1915) 486.

¹⁵⁴As already pointed out in this article, this is not in accord with the prevailing view.

¹⁵⁵Seekriegsrecht 295; Recht (1915) 280; Oesterr. Zeitschrift für öffentliche und private Versicherung (1914-15) 530.

¹⁵⁶Prisenrecht 510.

Hirschmann,¹⁵⁷ Rehm,¹⁵⁸ impose a liability for neutral cargo destroyed by the captor.

According to the last-mentioned writer, there is a liability to pay compensation for such cargo, both under the principles of international law and under the Prize Code. He also rejects the distinction made by the French courts to the effect that where the destruction of the enemy vessel took place for military reasons (as in the case of *The Désaix*) no compensation is due. But where the enemy vessel is sunk while offering armed resistance or actively participating in hostilities he states that no compensation is payable.¹⁵⁹ But mere presence in the war zone is not sufficient in his view to take away the right to compensation.¹⁶⁰

Somewhat different questions arise in the case of the destruction of neutral prizes.¹⁶¹ This matter was considered at great length at the Second Hague Peace Conference in 1907, but no decision was reached; and the question came up again at the London Naval Conference in 1909, where the rules were embodied in arts. 48-54 of the Declaration of London.

Art. 113 of the Prize Code provides:

Where a neutral vessel has been captured under the circumstances set forth in art. 39 for carrying contraband, or in arts. 77 and 78, for breach of blockade, or in art. 51, for rendering unneutral services, the commander may destroy the same,¹⁶² provided that:

a. the vessel is subject to condemnation (*cf.* arts. 41, 51, and 80), and, in addition thereto,

b. the bringing into port would subject the war vessel to danger, or be liable to impede the success of the operations in which it is at the time engaged. Among other circumstances this may, *inter alia*, be assumed to be the case, if:

¹⁵⁷Internationales Prisenrecht 123.

¹⁵⁸Neue Fragen des deutsch-englischen Seekrieges; in Deutsche Juristen Zeitung (1915) 454. See also his article, Der Unterseebootkrieg, 9 Zeitschrift für Völkerrecht 20, 36.

¹⁵⁹This is in accord with the English view but opposed to the American cases.

¹⁶⁰For a contrary view on this point, see von Zorn in Der Tag, 17th March, 1915.

¹⁶¹See, Huberich, The Destruction of Neutral Prizes and the German Prize Code, 10 Illinois Law Review 5-10; Speyer and Huberich, De Medea, Weekblad van het Recht, No. 9759.

¹⁶²The destruction of a vessel need not be determined upon by the commander in person. The decision may be left to a subordinate officer. The Tello, Hamburg Prize Court, 11th December, 1915. Appeal dismissed, 29th June, 1916.

(1.) the vessel, on account of its defective condition or by reason of deficiency of supplies, cannot be brought into port; or

(2.) the vessel cannot follow the war vessel, and is therefore liable to recapture; or

(3.) the proximity of the enemy forces gives ground for a fear of recapture; or

(4.) the war vessel is not in a position to furnish an adequate prize crew.

Art. 114 provides that in determining whether a neutral ship is to be destroyed, the captor must consider whether the damage to the enemy will outweigh the damages payable in respect of that part of the cargo which is not subject to condemnation. In all cases of doubt, a vessel not capable of being brought into port for adjudication should be released.¹⁶³ Where a neutral vessel is destroyed, and it is held by the prize court that the circumstances mentioned in article 113 (b) were not present, compensation must be made for the ship and cargo, regardless of whether these were subject to condemnation or not. If it be found that the ship or cargo destroyed were not liable to condemnation there is a similar right to compensation.¹⁶⁴

The best known cases under this head are *The William P. Frye* and *The Medea*. The former was an American,—and at the time a neutral—vessel sunk by a German cruiser.¹⁶⁵ The Dutch steamer *Medea* was sunk by a German submarine while engaged in the carrying of contraband. In the *Medea* case it was held by the Hamburg Prize Court¹⁶⁶ that compensation must be paid for neutral cargo, not contraband, destroyed with the vessel.

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¹⁶³Prize Code, art. 119.

¹⁶⁴Prize Code, art. 115.

¹⁶⁵The incident gave rise to an extended diplomatic correspondence, set forth in Department of State, Diplomatic Correspondence with Belligerent Governments, No. 1, pp. 85, 86; No. 2, pp. 185-189; No. 3, pp. 311-318.

¹⁶⁶13th August, 1915.

APPENDIX.

AMENDED CONTRABAND LISTS.¹⁶⁷

ABSOLUTE CONTRABAND.

1. Arms of all kinds, including arms for sporting purposes, their component parts, as well as semi-manufactured articles which can be used in their manufacture.

2. Projectiles, cartouches and cartridges of all kinds, their component parts, as well as semi-manufactured articles which can be used for their manufacture.

3. Gunpowder and explosives of all kinds, smoke-producing and illuminating substances, incendiary matter, implements and substances for fighting with gas, and materials which can be used for their manufacture, including: nitric acid and nitrates of all kinds; ammonia, ammonia liquor, ammonium chloride, ammonium salts; sulphur, sulphur dioxide, sulphite and thiosulphite, sulphuric acid, fuming sulphuric acid (oleum), carbon bisulphide; acetic acid, acetates, for example, acetate of calcium; acetic ether, formic acid and formic acid salts, formic ether, sulphuric ether; acetone; ethyl and methyl alcohol, spirit, sulphite spirit, crude wood spirit, alcohol of all sorts and its derivatives, as well as the products thereof; urea; resin, resinous products, camphor and turpentine (oil and spirit); carbide of calcium, cyanamide and its compounds; phosphorus and its compounds; chlorates and perchlorates of sodium, barium and calcium; chlorine, chlorhydrin; bromine; phosgene (carbonyl-chloride); stannic chloride; mercury; asphalt; mineral pitch; pitch; tar, including wood-tar, wood-tar oil; benzol, toluol, xylol, solvent naphtha, phenol (carbolic acid), cresol, naphthalene and their mixtures and derivatives; aniline and its derivatives; glycerine; dioxide of manganese; oxalic acid and oxalic acid salts; paper and cardboard of every kind and in every form, and the refuse thereof; wood-pulp and cellulose.

4. Cannon barrels, gun mountings; limbers, munition wagons, field kitchens and bakeries, supply wagons, field forges, searchlights, searchlight accessories and their component parts.

5. Range-finders and their component parts.

6. Binoculars, telescopes, chronometers, nautical and artillery instruments of all kinds.

7. Clothing and equipments of a recognizably military character.

8. Saddle, draught and pack animals, suitable at present or in the future for use in war.

9. All kinds of harness of a distinctively military character.

10. Articles of camp equipment and their component parts.

11. Armor plates.

12. Steel and iron wire; barbed wire, as well as implements for fixing and cutting the same.

13. Sheets, tinned or galvanised.

14. Warships and other vessels of war, as well as component parts of such a nature that they can be used only on a vessel of war; ship plates and ship construction steel.

15. Submarine sound-signalling apparatus.

16. Airships and aeroplanes of all kinds and their component parts, together with accessories, articles and materials for use in connection with aerial navigation; goldbeaters' skin.

¹⁶⁷As set forth in the Ordinance of 25th June, 1917, [Reichsgesetzblatt (1917) 554], as amended by the Ordinance of 18th January, 1918, [Reichsgesetzblatt (1918) 43]. The translation follows that prepared by the British Foreign Office and published in the London Gazette, 7th August, 1917.

17. Photographic articles.
18. Tools and appliances designed exclusively for the manufacture and repair of arms and war material.
19. Lathes, machinery and tools used in the manufacture of munitions of war.
20. Electrical articles designed for use in war, and their constituent parts.
21. Mining timber, including undressed and partly dressed timber for mining purposes, rattan, bamboo, cork, including cork flour.
22. Coal and coke, including pitch coke and petrol coke.
23. Flax, hemp, jute, ramie, esparto grass, cocoanut fibre, kapok, vegetable fibres and yarns and rope-strands made therefrom.
24. Wool and animal hair of all sorts; the same in its various stages of manufacture up to and including yarn, and the waste products of manufacture.
25. Raw cotton, linters, cotton waste, cotton yarns, cotton goods, rags, waste, and artificial cotton.
26. Barrels and tanks of all kinds and their component parts.
27. Gold, silver, paper money, securities, negotiable trade papers, every kind of check, draft, order of payment, dividend coupons, interest and annuity certificates, letters of credit, of transfer and of advice, notifications of credit and debit or other documents which, whether in themselves or on completion or by virtue of any operation on the part of the recipient, empower, confirm or effect the transfer of sums of money, credits or securities.
28. Rubber tires for motor vehicles, as well as all articles and materials used specially in manufacturing or repairing rubber tires.
29. Rubber (including crude rubber, waste rubber, reclaimed rubber, rubber solution, rubber cement, or any other preparation containing rubber), balata and gutta percha, as well as the following kinds of rubber, viz.: Borneo, Guayule, Jelutong, Palembang, and all other materials containing rubber; besides articles which are made in whole or in part of rubber.
30. Mineral oils (including shale oils, petroleum, benzine, naphtha, gasoline).
31. Lubricants.
32. Tanning material of all kinds, including quebracho wood and the extracts used in tanning.
33. Hides of cattle, buffaloes and horses; hides of calves, pigs, goats and wild animals; and leather dressed or undressed, if suitable for use in saddlery, harness, military boots and military clothing; beltings, hydraulic leather and pump leather.
34. The following ores: Tungsten ores, molybdenite, manganese ore, nickel ore, chrome ore, zinc ore, lead ore, hematite iron ore, pyrites (crude and calcined), copper ores, cadmium ore, vanadium ore and cobalt ore.
35. Aluminum, its alloys and compounds; argillaceous earth, bauxite.
36. Arsenic and antimony, and their compounds.
37. Felspar, borax, boracic acid and other boric compounds, borax-bearing earths and minerals (borax-lime and boraxite).
38. The following metals: Tungsten, molybdenum, vanadium, nickel, selenium, cobalt, hematite pig iron, manganese and its alloys, copper and its alloys, tin, lead, zinc, cadmium and its alloys; zirconium, cerium, thorium and their alloys and compounds; oxide of zirconium, monazite sand; platinum, osmium, ruthenium, rhodium, palladium, iridium and their alloys and compounds.

39. Alloys of iron (ferro compounds), including tungsten, manganese, vanadium and chrome iron.

40. Insulating material, raw and manufactured.

41. Silk of all kinds and silk stuffs; silk cocoons; artificial silk and goods made therefrom.

42. All kinds of wax; sebacic acid.

43. Quillaya bark.

44. Talc, emery, corundum, carborundum and all other polishing materials, natural and artificial, and articles, prepared therefrom. Diamonds for industrial purposes.

45. Albumen.

46. Glass and glass articles of every kind. All kinds of bottles.

47. Lime, chalk, chloride of lime, lead powder, soda and caustic soda.

48. Strontium and barium salts.

49. Bone charcoal.

50. Graphite of all sorts, whether in lumps or ground; graphite crucibles and the shards thereof, Atcheson's graphite, electrodes and fragments thereof.

In the interpretation of these provisions relating to absolute contraband, it has been held that the term "explosives" as used in subsection 3, includes not alone such objects as are immediately available as explosives in the condition in which they are at the time of the seizure, but also materials which can after a not too difficult or expensive process, be utilized as such. It was accordingly held that esparto grass, although not specifically on the list of absolute contraband at the time of the seizure, should, in view of its possible use in the manufacture of explosives, be regarded as absolute contraband. The Jeanne, Hamburg Prize Court, 6th July, 1917. The words "ship plates and ship construction steel" as used in subsection 14 include all steel materials or materials in the nature of steel, suitable for shipbuilding. The Braga, Kiel Prize Court, 22nd August, 1916. The component parts and accessory machines of lathes (subsection 19) are absolute contraband. The Dania, Kiel Prize Court, 5th December, 1915; The Artemis, Kiel Prize Court, 6th October and 24th November, 1915. The same applies to hydraulic presses designed for the manufacture of munitions. The Heini, Superior Court of Prize, 6th October, 1916; and to razors addressed to the Royal Army Clothing Department. Hamburg Prize Court, 13th August, 1915.

CONDITIONAL CONTRABAND.

1. Foodstuffs.

2. Forage and all kinds of feeding stuffs for animals; oil seeds, nuts and kernels; animal, fish and vegetable oils and fats, excluding those suitable as lubricants, and not including volatile oils; yeast.

3. The following articles, if suitable for use in war: articles of clothing, fabrics for clothing, footgear, skins and furs which can be used for clothing, boots and shoes.

4. Vehicles of all kinds and their component parts, as well as accessories (especially all motor vehicles), suitable for use in war.

5. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs and telephones.

6. Fuel, exclusive of coals, coke and mineral oils.

7. Horseshoes and shoeing materials.

8. Harness and saddlery.

9. Ships, boats and floating craft of all kinds, floating docks and appliances for dry docks, as well as their component parts.

10. Cement.

11. All kinds of timber, rough or worked (especially hewn, sawn, planed, grooved), excepting mining timber, etc. [See item 21, under absolute contraband.]

12. Sponges, raw or prepared.

13. Glue, gelatine and materials used in their manufacture.

14. Soap.

15. Paint for ships' hulls.

16. Lac.

17. Copper vitriol.

18. Lathes and such machines and tools as are used principally for the manufacture and repair of arms and war material.

In interpreting subsection 1, it has been held that the term "foodstuffs" applies to oranges and mandarines, *The Medea*, Hamburg Prize Court, 13th August, 1915, lemons, *The Iyden*, Kiel Prize Court, 15th December, 1915, *premier jus*, *The Lestris*, Superior Court of Prize, 8th January, 1918, and to onions—at least in large quantities, *The Luise*, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915. The same was held as to chocolates and sweets, where some of the packages bore the words "for our soldiers." *The Zaanstroom*, Hamburg Prize Court, 1st June, 1915. But grapes, pears, and cauliflower are not contraband. *The Luise*, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915. Motorcycles, *The Tor*, Kiel Prize Court, 12th August, 1915, and bicycle parts, *The Luise*, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915, come within subsection 4. Matches are "fuel" within subsection 6. *The Thorsten II*, Kiel Prize Court, 12th September, 1916. Ship motors are within subsection 9. *The Luise*, Kiel Prize Court, 24th February, 1915, affirmed, Superior Court of Prize, 25th November, 1915. But small electromotors used for propelling table fans and sewing machines on board a vessel are not component parts of a vessel, within subsection 9. Not all objects that may be used on board vessels are necessarily within this category. Objects that are capable of use on land are not contraband, unless it be shown that they were specially designed for use on board vessels. *The John Wilson*, Superior Court of Prize, 24th May, 1917. Sawn fir sleepers come within subsection 5. *The Grenland*, Superior Court of Prize, 6th October, 1916. Building Timber is within subsection 11, *The Laila*, Hamburg Prize Court, 4th November, 1915; *The Belle Ile*, Superior Court of Prize, 6th July, 1915; *The Elida*, Superior Court of Prize, 18th May, 1915. Sawn boards and staves. *The Gefion*, Superior Court of Prize, 18th June, 1915. Whale oil is within subsection 2. *The Sigurd Hund*, Hamburg Prize Court, 4th November, 1915. But is now absolute contraband. *The Thor II*, Hamburg Prize Court, 16th November, 1917. But steel for umbrellas is not contraband. *The Crimdon*, Kiel Prize Court, 6th January, 1915. It has also been held that wood fibre to be used for the manufacture of paper is not contraband. *The Crimdon*, Kiel Prize Court, 6th January, 1915. But this is now obsolete, as this material is declared absolute contraband by the Ordinance of 18th January, 1918. Plants are not contraband. *The Harald Haarfager*, Kiel Prize Court, 4th July, 1917.

ARTICLES THAT MAY NOT BE DECLARED CONTRABAND.

1. Hops.

2. Horns, bones and ivory.

3. Natural and artificial fertilizers in so far as specified substances have not already been expressly declared contraband.

4. Earths, stones including marble, bricks, slates and roofing tiles.

5. [Repealed 18th January, 1918.]

6. Colours, including the materials exclusively used for their manufacture, with the exception of paint for ships' hulls; varnish.

7. Sulphate of soda in cakes.

8. Machinery specially adapted for agriculture and for printing.

9. Precious stones, excepting diamonds used for industrial purposes [see art. 21, under (44)]; semi-precious stones, pearls, mother of pearl and corals.

10. Steeple and wall clocks, timepieces and watches, excepting chronometers.

11. Fashion and fancy goods.

12. Feathers of all kinds.

13. Articles of domestic furniture, and decorative articles for domestic purposes; office furniture and appliances.

LEGAL THEORIES OF PROFIT.

For centuries jurists and economists have studied the subject of profits, and their general analysis of the entrepreneur's income has grown constantly more complex. During the medieval period, the fair price of a commodity in England was its customary exchange value; and town guilds, common law courts, and even writers on industrial questions usually treated profit as a return for labor and effort spent in the production of economic goods. This was obviously a labor concept, but in many discussions of the time, there appeared the risk theory, which conceded to the entrepreneur a return for the risk and trouble of employing capital productively. Indeed, both the labor and risk concepts of profit are to be found in the writings of the English and American economists down to this day; but in comparison with other profit theories, the former has occupied until recently the most secure position in the fields of law and economics. Stated concisely, one group of modern economists take a conservative view of the entrepreneur function, and by a simple method represent his residual surplus as massed into a single, but complex labor product, with many peculiarities.

In distinct contrast to this well-established view has arisen a more recent surplus value theory, which explains the entrepreneur's profit as an unearned residual income above cost of production, and as largely the result of dynamic changes in industry. This important tenet has, therefore, found sufficient reason for its existence in the evolution of modern conditions; and the permanent foothold which it has secured in economic thought makes it an important element in any thorough analysis of the entrepreneur's income. To be sure, other modern doctrines of considerable importance present a variety of views which resemble more or less the labor theory, on the one side, or the surplus concept on the other; but it is the unusual importance and the wholly irreconcilable nature of these two main theories that have forced upon jurists and economists alike an inevitable division in economic thought, and made the subject of profits a burning question. Each theorist is partly right. But obviously the labor concept of profits cannot embrace the vast unearned surpluses of to-day arising from restraint of trade and predatory conquest. Neither is any surplus

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theory of profits scientifically sound which classifies as unearned the differential returns from reduced costs of production. Surely more efficient technical processes or better inventions yield a definite measure of earned income.

Clear it is, then, that no one view of profits is wholly correct; and the legal theories of this residual surplus, which are already established in our common law, are, therefore, presented here as one step in the task of distinguishing fundamental concepts of the entrepreneur's various increments. The income known in law as profits resembles much a stream with many tributaries. It may include concrete things; as, payments in kind, services, soil, and objects beneath the surface of the earth, on the one hand, and such wholly unreliable returns as may fall to the hand of the gambler on the other. And whether the entrepreneur devotes his activities to the field of agriculture, commerce, or manufacturing—or to any of their allied pursuits—this income appears to flow constantly from numerous sources which depend more or less on the adjustment of natural and social forces. In fact, it may be said that the many accretions from the operation of industrial forces really make up gross profits, but courts of law seldom tarry over the gross income; the terms "rents" and "profits" are usually interpreted as meaning "net profits". A much quoted opinion defines profits as the excess of receipts over the expenditures necessary to earn them¹; but the apparent simplicity of this legal formula is soon lost sight of in the solution of practical problems. In striking this balance between the total income and the outgo, divers methods of arriving at the final result have given us several concepts of profits; and in studying the general plan of profit analysis, as a whole, the economist is impressed by the increasing tendency on the part of American courts to obliterate the well-known distinctions which writers on economic theory have maintained for a century between profits, rent, and interest.

I.

American judges have not taken kindly to the labor concept of profits, which represents this income as primarily one form of the wages of labor. This fact may be due in a measure to their failure to read the early common law cases, and to their superficial examination of the works of the classical economists. That is to say,

¹See *Mersey Docks v. Lucas* (1883) 8 App. Cas. 891 at p. 908; *Last v. London Assurance Corp.* (1885) 10 App. Cas. 438 at p. 450.

inexact definitions, drawn from these writers on the subject of profits, have been carried in legal opinions for generations, working unique effects in the distribution of wealth.

The more common of these interpretations conveys the terse statement that profit denotes the difference between the value of the advances and the returns resulting from their employment. By the term "advances" the courts doubtless have in mind here simply the outgo of the entrepreneur as expenses of production. And the amount represented by the phrase "returns resulting from their employment", may be assumed as equivalent to the gross income of the entrepreneur. This definition was probably taken from the early discussion of profits by Thomas Malthus; and if we stop to consider the slow progress made previous to this time in economic theory, it was not an unhappy expression of his theory of profits. But in constructing a more scientific definition of profit, courts have used the writings of these early economists authoritatively to eliminate the wages of superintendence from the entrepreneur's profits. Thus the Supreme Court of California includes, among other definitions of profit, a common interpretation from the works of Adam Smith and J. S. Mill:

"In distinction from the wages of labor," runs this definition in referring to profit, "it is well understood to imply the net return to the capital or stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital stock. (Adam Smith's *Wealth of Nations*, b. 1, c. 6; Mill's *Political Economy*, c. 15.)"²

This is an erroneous interpretation of J. S. Mill's definition; it has been accepted by the courts without troubling themselves to refer to the exact words of that learned economist, whose statement is, in fact, quite the contrary.

The line drawn between wages and profits in this interpretation may be taken as a modern, though not undisputed theory in legal history. Yet it was used as early as 1828 in separating the various issues and incomes from land. The income of an estate meant nothing more to a court in Maine than the profits that it would yield after deducting the charges of *management*. The rent which could thus be obtained from this estate was its income; for, said

²*People v. Savings Union* (1887) 72 Cal. 199, at p. 202-203, 13 Pac. 498.

the court, "The rents and profits of an estate, the income, or the net income of it, are all equivalent expressions."³ This hostility toward a labor theory of profits is more clearly expressed in Illinois. In 1878 its supreme court was of the opinion that compensation for the labor of the officers of a corporation could not be regarded as profit within the meaning of the law. Profit in its ordinary sense was construed to mean the gain from any business or investment—"a different thing altogether from mere compensation for labor."⁴ Highly significant is the fact that this modern tendency to discard the ancient labor concept of profits is following gradually a process of elimination in which the final surplus, or remaining profit going to the entrepreneur, will finally be largely an unearned increment. That is, except for the worry and risk taken in connection with a business, there will be no human sacrifice recognized in law to which it may be attributed by either judge or jury.

Yet it seems that academic authority is not entirely responsible for this result.

"Profits are divided by writers on political economy," states Bouvier's Law Dictionary, "into gross and net,—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name, but it represents the profits attributable to industry, skill and enterprise. See Malthus, Political Econ.; M'Culloch, Political Econ. 563."⁵

It will be noted that the "remainder of the difference", which has no particular name, but is imputed here to some form of activity, skill or enterprise on the part of the entrepreneur, is really a modern interpretation of the labor concept of profit. Yet the author does not explain this profit as a particular form of labor wage. The truth is that this interpretation was originally taken from two early works on economics, and it illustrates well the persistent hold which previously accepted theories often retain in modern

³Andrews v. Boyd (1828) 5 Me. 199, at p. 203; see also Earle v. Rowe (1853) 35 Me. 414, at p. 420.

⁴Commercial League, etc. v. People (1878) 90 Ill. 166, at p. 173.

⁵3 Bouvier, Law Dictionary (Rawle's 3rd rev.) 2737.

law. To be more explicit, it is said on the same page, in reference to the teachings of Adam Smith and J. S. Mill, that profits imply the net return to the "capital of stock" employed after deducting all the expenses, including the wages of the capitalist himself; and, to quote the author's exact words, "After indemnifying the capitalist for his outlay, there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill, *Polit. Econ.* c. 15." Now if the author of these excerpts had read carefully chapter 15, book II of J. S. Mill's work on Political Economy, he would have found that the nameless surplus, which he has thus separated from the return to capital, is called "wages of management"—a fact which the courts have several times denied. These excerpts but emphasize one of the many anomalies of the law that arise through inexact quotations from previous authorities both legal and economic.

Again, it is necessary at this point to draw attention to another exception to this rule of the law; for the foregoing opinions against the labor concept of profits do not occupy undisputed possession of the field. In rendering damages for injury to property, courts of law include wages of management as a part of the profits of an enterprise. The rule of compensation for damages was probably first applied in very early cases to the earnings of the laborer and the strictly professional man. That is, we find that the value of their services was often estimated as profits. And there is now a well-established rule of law which allows the entrepreneur to recover compensation for any injury to his income from the wages of superintendence and management. In fact, in estimating the amount of damages due to loss of profits, personal earnings rather than the income from capital are usually preferred in establishing the legal rule of compensation. In this relation the decisions of several states have been quite uniformly against the recognition of profits on capital. This tendency is, of course, of great significance; for the courts have given us a remarkable series of legal data which serve to distinguish the personal earnings of the entrepreneur, and consequently to give them a secure legal position in law as profits. This same attitude, however, is sometimes taken by judges in cases arising outside of the field of damages. One example will probably make this point plain. In deciding upon the right of a state to levy a tax upon the profits of a merchant's stock in trade, the Supreme Court of Massachusetts in 1870 distinguished between the income from a profession, trade or employ-

ment, which was already taxable, and that arising from capital invested as stock in a business.

"The income meant by the statute", declared the court, "is the income for the year, and is the result of the year's business. It is the net result of many combined influences: the use of capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit, and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry and skill."⁶

It seems clear at this point that the modern concept of profits, as a return from the personal labor of the entrepreneur, will always be used by courts in determining the rule of compensation in injury to property. And it is equally plain that the obvious departure from the labor concept of profit, which we have previously noted, was due largely to a hasty misconstruction of J. S. Mill's definition of profit. There is, in fact, no ground in Mill's work for the statement that wages of management are excluded from profits.

But the opinions against the labor concept of profits are also in conflict with many ancient and modern decisions on this point. In 1882 a court of Ontario held strictly to the labor concept embodied in a previously accepted definition of the word "profits": "In a wider sense it means, according to the Imperial Dictionary", explained Chief Justice Spragge, "any advantage, any accession of good from labor or exertion."⁷ Somewhat later it was pointed out in the opinion of a court of Pennsylvania that profits derived from the management of a business enterprise were not equivalent to total earnings. To be sure, the word "earnings" was interpreted narrowly according to the definition cited from Anderson's Law Dictionary⁸ as "the fruit or reward of labor, the price of services performed."⁹ In the conclusion, however, profit seems here to have been made equal to the total net gain of an enterprise, but depending largely upon other circumstances than the earning

⁶*Wilcox v. County Commissioners* (1870) 103 Mass. 544, at p. 546.

⁷*Workman v. Robb* (1882) Ont. App. Rep. 399, 400, at p. 404.

⁸At p. 390.

⁹*Goodhart v. Pennsylvania R. R.* (1896) 177 Pa. 1, at p. 15, 35 Atl. 191.

capacity of the manager. The opposite idea is, however, put more tersely by this same court in another decision. It is said, indeed, that in many instances profits derived from the management of a business may properly measure its earning power. Especially is this true, emphasized the court, if the enterprise received the personal attention and labor of the owner.¹⁰

Turning to other examples, the medieval labor concept of profit is also retained in various cases in which the right to commissions on property sold by an agent is adjudicated. In English law, commissions, which would accrue to public agents for the sale of merchandise, were regarded as profits, and could be insured as such.¹¹ In two instances the right of a person to participate in the commissions of a business, was held to make him a partner.¹² In the United States a commission charged for the sale of western land was construed by the Supreme Court of Washington to be profits and a part of the net returns.¹³ In like manner, where the sale of a copyrighted map was an infringement upon the rights of the owner, the commissions derived from the improper act were distinguished as a part of the profits and turned over to the plaintiff in the case.¹⁴

There are, of course, many conflicting decisions on this point, yet in the face of other profit theories, the labor concept is gradually losing its place in the legal field; for the returns upon all higher forms of mental and physical labor are being gradually merged into wages. But the net profit surplus, above wages of management, at which jurists are gradually arriving by this process of elimination—the excess of value returns over advances—remains to them still a complex subject.

II.

The rent concept of profit as simply a return from land holds a very substantial position in English and American law; it has, in fact, come down to us from medieval times. In its original meaning, rent was defined as a sum of money, or other considera-

¹⁰Wallace v. Pennsylvania R. R. (1900) 195 Pa. 127, at p. 130, 45 Atl. 685.

¹¹Lucena v. Crauford (1802) 3 Bos. & Pul. 75, reversed on its facts in the House of Lords. (1806) 2 Bos. & Pul. N. R. 269.

¹²Waugh v. Carver (1793) 2 H. Bl. 235; Cheap v. Cramond (1821) 4 B. & Ald. 663; Young v. Axtell (1784) cited in Waugh v. Carver, *supra*, at p. 242.

¹³Cooke v. Cain (1904) 35 Wash. 353, at p. 359. 77 Pac. 682.

¹⁴Stevens v. Gladding (C. C. 1856) 23 Fed. Cas. No. 13,399.

tion, issuing yearly out of lands or tenements; or again, it was said to be a part of the profits of such property, paid not necessarily in money, product or labor—which were frequently rendered for rent—but in anything which could be regarded as a fixed amount or be reduced to a certainty.¹⁵ Consequently, the fact that rent was fixed and issued only out of land served to distinguish it from other forms of profit obtained either from the land or the chattels on it. Thus Lord Coke states that if a house and land “with a stock or sum of money rendering rent” be demised for a term of years, “the assignee shall not be charged with this covenant: for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum but out of the land only”.¹⁶ This “stock or sum”, as used in this excerpt, is an independent factor, and does not, therefore, include the buildings on the land, for these are tenements and virtually a part of it. Rent issues, of course, from the tenements, and to this extent, it may be conceded that legally it arises from the use of capital. But rent could not be reserved out of any chattel, office, fair, market, common, franchise, privilege, tithe or advowson.¹⁷ Indeed, from the numerous cases involving the payment of rent, it is clear that it was only by the most careful discrimination that early English judges were able to keep the rent profit entirely distinct from the income of stock or chattels.

The question whether rent may ever originate in the use of the stock obtained by the tenant with leased premises is, of course, not new to American jurists; and a most difficult issue has arisen over the doctrine of apportionment; namely, whether there should ever be a deduction of the rent in case the tenant suffers a loss on his leased stock. To allow an apportionment of the rent according to this loss would obviously extend the rent concept to chattels and therefore break, in effect, the ancient rule. An English authority¹⁸ cites a specific instance in which all of the sheep on certain leased premises had died. He is inclined to think that under such circumstances the rent would not be apportioned; for although it

¹⁵Co. Lit. 47a, 142, 142a; *Smith v. Colson* (N. Y. 1813) 10 Johns. 91; *Gilbert, Rents* 87; *Browning v. Beston* (1556) 1 Plow. 131, at pp. 132, 138, 141; 2 Bl. Comm. *42, *43; *Minor Inst.* 32-43.

¹⁶*Spencer's Case* (1583) 5 Coke 16a, at p. 17a; See *Commonwealth v. Contner* (1852) 18 Pa. 439; *Fay v. Holloran* (N. Y. 1861) 35 Barb. 295, at p. 297; *Minor Inst.* 34.

¹⁷Co. Lit. 47a, 142a, 144a; 2 Rol. Abr. 446.

¹⁸*Gilbert, Rents*, 187-188, citing *Richards le Taverner's Case* (1544) 1 Dyer *56.

was naturally increased by the profits which arose from the sheep, "it may be doubted, whether the Rent shall be abated, while The tenant enjoys all the Land out of which the Rent issues." This opinion was known to the Supreme Court of Virginia which departed from the established principle in 1808. Action for rent was brought against one who was entitled by a lease both to the services of a mill and the miller. But the latter having been given his freedom according to law declined to continue in the service of the lessee. Although the court acknowledged that it had found no case expressly in favor of the opinion which it entertained, yet it was of the belief that the jury could have apportioned the loss which the tenant had sustained by the departure of the miller.¹⁹ However, in a later case it would seem that the court purposely evaded giving an opinion on this exact point.²⁰ Also, in Pennsylvania the change in the established doctrine of apportionment came suddenly. In 1852 we find the supreme court of that state declaring, according to the accepted theory, that "a sum of money, payable periodically, for the use of chattels, is not RENT in any legal sense of the word."²¹ But four years later the ancient principle was repudiated:

"The ordinary definition of rent, as a profit issuing yearly out of lands and tenements corporeal," runs the opinion of the court, "is defective in overlooking some of the cases that belong to the class; as where a furnished house or a stocked farm is leased, which are common cases: 5 *Bos. & P.* 224; 5 *Co.* 16b; 1 *Leon.* 42. In such cases the personal property is really a part of the consideration of the rent, and it is only by fictitious accommodation of the case to the defective definition, that it can be said that the rent issues exclusively out of the land. It is better to correct the definition."²²

By persisting in this view, the courts of Pennsylvania have affixed the rent concept more or less permanently to capital; but it need hardly be repeated that this theory is an exception to the general rule now prevailing in the United States.

At the present time the rent concept of profit may still be distinguished from other ideas of profit by the frequent declaration

¹⁹*Newton v. Wilson* (1809) 13 Va. 470.

²⁰*Scott v. Scott* (1868) 59 Va. 158.

²¹*Commonwealth v. Contner*, *supra*, footnote 16, at p. 447.

²²*Mickle v. Miles* (1856) 31 Pa. 20, at p. 21; see also *Vetter's Appeal* (1881) 99 Pa. 52, at p. 55.

that rent is a fixed yearly return issuing only out of the land.²³ And by an ancient *dictum*, it is not to be considered a part of the land or thing out of which it issues.²⁴ In contrast to rent, other profits are said to be the residual surplus from various sources, fluctuating and uncertain in character, and depending on skill, care, and the nature of the business transaction.²⁵ Yet a dangerous tendency to fuse the incomes of land is not entirely absent. In referring to previous quotations, which it had gathered from various decisions, the Supreme Court of New York in 1903 declared: "There is no such technical or peculiar meaning to the phrase 'rents and profits' as to deny a synonym in 'profits and gains'. A rent is a profit, and the profit in rents and profits is a profit still."²⁶ Stated concisely, the situation is simply this: the courts of one state are striving to differentiate the concepts of profit, while the judges of another state are consciously synthesizing the same ideas. But in general one is fully impressed by the important fact that although the legal theory of rent is obviously a productivity concept, it is, nevertheless, still confined to land and its tenements.

III.

The capital concept of profit is used here in a broad sense to include the growth or increase of capital itself by accretions of product or earnings. As all products are capital to the economist, while they are still devoted to production, and as all earnings are capital to the business man, until they are declared to be dividends, this concept of profit represents simply the additions to capital created through productive effort. Courts seldom go to the trouble of separating the exact annual output of capital from the previous

²³Fay v. Holloran, *supra*, footnote 16, at p. 297; Stephens v. Reynolds (1852) 6 N. Y. 454, at p. 458; Dolph v. White (1855) 12 N. Y. 296, at p. 300; Sutliff v. Atwood (1864) 15 Ohio St. 186, at pp. 192-193; Jones v. Smith (1846) 14 Ohio 606, at p. 608; Van Wicklen v. Paulson (N. Y. 1853) 14 Barb. 654; Bloodworth v. Stephens (1875) 51 Miss. 475, at p. 480; Boyd v. McCombs (1846) 4 Pa. 146; Ivy v. Gilbert (1722) 2 P. Wms. *13; Attorney General v. Foundling Hospital (1793) 2 Ves. Jr. 42, at p. 48; Armstrong v. Cummings (N. Y. 1880) 58 How. Pr. 331.

²⁴Browning v. Beston, *supra*, footnote 15, at p. *132.

²⁵Bennett v. Austin (1880) 81 N. Y. 308, at p. 319; Last v. London Assurance Corp. (1885) 10 App. Cas. 438, at p. 450; Mersey Docks v. Lucas (1883) 8 App. Cas. 891, at 905; Freeman v. Freeman (1886) 142 Mass. 98, at p. 99-100, 7 N. E. 710; Rogers-Ruger Co. v. McCord (1902) 115 Wis. 261, at p. 265, 91 N. W. 657; Jones v. Davidson (1854) 34 Tenn. 447, at p. 452; Owston v. Ogle (1811) 13 East 538; Hitchcock v. Tremaine (1872) 12 Fed. Cas. No. 6, 540.

²⁶Thorn v. De Breteuil (1903) 86 App. Div. 405, at p. 416, 83 N. Y. Supp. 849.

total concrete mass used in production; distinctions of this sort are usually beyond their sphere. Moreover, judges also recognize that the earnings of a business are often turned back into the original fund of capital, which goes on its ceaseless round, its constant transformations, and its definite wealth-producing cycle.

This concept of profits crops out at unexpected angles from either the simple natural economy of the farm or the more active fields of finance in the commercial world. By way of illustration, the lessee of certain premises in Ontario erected thereon suitable buildings for use in his own trade, which were intended to go ultimately to his landlord in payment of rent. Obviously, both in a legal and an economic sense, these structures were capital. Although the court hesitated to call them rent, it did, nevertheless, rule that they were profits which were finally to become possessions of the landlord. In this sense, therefore, profits took the form of concrete products which were already devoted to further production. Indeed, in the opinion of Mr. Justice Spragge there was no necessity for restricting the word "profits" to a periodical return from the land, though that was conceded to be its common meaning. The decision states that "In a wider sense it means, according to the Imperial Dictionary, 'any advantage, any accession of good from labor or exertion'. In that sense Robb received a profit every time that a building or addition to a building was placed upon his land."²⁷ In this, as well as in other opinions, judges have simply reverted to the medieval method of measuring profit in terms of product or payment in kind. In a case in Connecticut the phrase "profits from the farm" was construed to comprise, not only net profits, but all of the products raised by the tenant.²⁸ A similar example may be found in the state of Washington. In 1897 the supreme court was of the opinion that "while in a strictly etymological sense, it might be that neither the words 'rents, issues, or profits' would embrace the increase of cattle, yet to give this narrow and restricted construction to the statute would lead to results inconsistent with the evident intention of the legislature, which passed the community property law."²⁹ Profits were therefore taken to include the increase of cattle.

Turning to the realm of higher finance, we find that even there capital may also include profits. For example, in New Jersey profits do not necessarily imply money to be divided. In the words

²⁷*Workman v. Robb*, *supra*, footnote 7, at pp. 400, 404.

²⁸*Richmond v. Connell* (1887) 55 Conn. 403, 11 Atl. 853.

²⁹*Harris v. Van De Vanter* (1897) 17 Wash. 489, at p. 492, 50 Pac. 50.

of the court, "they may be represented by the unsold portion of the property which was the subject of the speculation."³⁰ But the broadest construction given to the capital concept has probably occurred in Iowa.

"Some difference is expressed," declared the court, "as to what are profits, and how they are to be arrived at. This is fully answered in *Miller v. Bradish*, 69 Iowa, 278, where it is said: 'The assets, resources and funds of the corporation must consist of cash on hand and other property, and, if such assets exceed the liabilities, a dividend can be lawfully declared;' in other words, a profit exists."³¹

It would seem from this decision that if the assets of a business exceed the liabilities by one dollar, then the capital or profits would also equal one dollar—that is, capital and profits would be identical.

That a considerable part of profits, at least, consists of earnings upon capital is a widely accepted theory in American law; it has sifted into our legal decisions from the opinions of English economists and statesmen. Still it is to be noted that such profits are not considered to be the equivalent of interest, but constitute rather the excess income above the expenditures necessary to earn it.³² Thus in 1883, Lord Selborne construed the profits of a business to be "all the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received."³³ In a similar case two years later, Lord Fitz Gerald adopted a more elaborate interpretation of profits by declaring that the expression means "the incomings of the concern after deducting the expenses of earning them," or "income of whatever character it may be over and above the costs and expenses of receipt and collection."³⁴ Also, in discussing the general field of profits, jurists have recently shown a marked tendency to avoid primary concepts. This means, of course, in particular states that the entrepreneur's residual incomes are fused into a single profit—the net return above expenses. Thus "divisible profits" are frequently spoken of as the net return which a company, after making

³⁰*Jones v. Davis* (1891) 48 N. J. Eq. 493, at p. 499, 21 Atl. 1035.

³¹*Hubbard v. Weare* (1890) 79 Iowa 678, at pp. 688-689, 44 N. W. 915.

³²*Bouvier, loc. cit.*

³³*Mersey Docks v. Lucas, supra*, footnote 25, at p. 903.

³⁴*Last v. London Assurance Corp., supra*, footnote 25, at p. 450; see also *Dean v. Dean* (1882) 54 Wis. 23, at p. 33-34; *Burt v. Rattle* (1877) 31 Ohio St. 116, at p. 130; *City of Allegheny v. Pittsburg, etc. R. R.* (1897) 179 Pa. 414, at p. 421, 36 Atl. 320.

all reasonable and adequate provision for its own safety, may properly divide among its stockholders.³⁵

It may be frankly acknowledged that in striking contrast to their neglect of the labor theory of profits, American jurists have given great weight to the earning power of capital. So much so, indeed, that in many instances—as in the case of manufactured goods—capital profit has been made to absorb the speculative gains of the market. Moreover, little need has existed, except in particular instances, of separating this form of profit from the unearned surplus. In the fields of trade and commerce, however, the direct connection between capital and income is less distinct, the “productivity” of capital is not so apparent, its earning power loses somewhat its usual emphasis, and it is, then, but a step to the idea that profits are simply the excess of receipts over expenditures. That is to say, American courts, as a whole, are slowly evolving, by a process of elimination, a pure *value concept* of profit.³⁷ In fact, though they do not distinguish profit as an unearned increment, they allow, nevertheless, in the solution of practical questions, a surplus value profit that is not a return on labor, capital, or land.

IV.

In both ancient and modern law land is sometimes designated as capital; and the previous capital concept of profit income, as it has been described, is, therefore, quite similar to the following theory that *land* itself constitutes profits. In a broad sense, objects upon the earth's surface, or anything beneath it, embody in a more or less fixed form such returns to the owner. The right to take timber, ice, stone, minerals, or sea weed from a tract of land is equivalent to an interest in the soil and therefore in its profits.³⁸ Of like nature is the right to use land simply for the purpose of

³⁵Bain *v.* Aetna Life Insurance Co. (1891) 21 Ont. Rep. 233, at p. 241; see Bond *v.* Pittard (1838) 3 M. & W. *358, at p. *360; People *v.* Savings Union, *supra*, footnote 2, at p. 203; Braun's Appeal (1884) 105 Pa. 414, at p. 417; Jones *v.* Davidson (1854) 34 Tenn. 447, at p. 452; St. John *v.* Erie Ry. (1872) 21 Fed. Cas. No. 12, 226; Connolly *v.* Davidson (1870) 15 Minn. 519, at p. 530; Eyster *v.* Centennial Board of Finance (1875) 94 U. S. 500; City of Allegheny *v.* Pittsburg, *etc.* R. R. *supra*, footnote 34. The commodity concept of profit really deserves to be treated separately. Portland Bank *v.* Apthorp (1815) 12 Mass. 259, at p. 263; Hamilton Co. *v.* Massachusetts (1867) 73 U. S. 632, at p. 640.

³⁷The value concept of profit represents this return as a surplus above the cost of production.

³⁸Kennedy Stave, *etc.*, Co. *v.* Sloss-Sheffield, *etc.*, Co. (1902) 137 Ala. 401, 34 So. 372; Payne *v.* Sheets (1903) 75 Vt. 335, 55 Atl. 656; Hill *v.* Lord (1861) 48 Me. 83, at p. 100; Huff *v.* McCauley (1866) 53 Pa. 206.

pasturing, fishing, or hunting.³⁹ Where the owner of a farm had allowed another to occupy it without the payment of rent, the single fact that the former had continued to pasture his cattle on the land, and to gather in a legal sense profits with the grass, prevented the tenant from getting exclusive possession against him.⁴⁰ Also, the tenant for life is usually entitled to enjoy all the profits of the land during his estate therein. Things to be consumed become his immediate profits; other objects also may be put to the use for which they are especially designed. Possessions which he may use or consume include, of course, all timber, minerals, oil, gas, and water on the land; and when his acts are not limited by expressed restrictions, he may, in supplying his own needs, work the land to the final stage of exhaustion.⁴¹ But in his enjoyment of such concrete profits he is not permitted to damage or waste the estate.⁴² Likewise, in other instances, one person may secure a right by grant, inheritance or prescription in the land of another; and his returns therefrom are termed *profits à prendre*.⁴³

Where a will has clearly provided for the settlement of debts out of the profits of an estate, the property itself is often sold to meet the requirements of the law.⁴⁴ Thus in 1739 an English court explained that the natural meaning of "raising a portion by rents issues, and profits is by the yearly profits;" but that the word "profits" has, in some particular instances, been extended to include any profits which the land will yield, either by sale or mortgage.⁴⁵ But a certain learned judge has stated that there is not

³⁹*Tinicum Fishing Co. v. Carter* (1869) 461 Pa. 21, at p. 37; *Albright v. Sussex County, etc.*, Comm. (1904) 71 N. J. L. 303, at p. 305, 59 Atl. 146; *Payne v. Sheets*, *supra*, footnote 38.

⁴⁰*Rennie v. Frame* (1896) 29 Ont. Rep. 586, at p. 590.

⁴¹*Rankin's Appeal* (Pa. 1888) 16 Atl. 82, at p. 87; *Koen v. Bartlett* (1895) 41 W. Va. 559, at p. 567, 23 S. E. 664; *Williard v. Williard* (1867) 56 Pa. 119, at p. 129; *Shoemaker's Appeal* (1884) 106 Pa. 392; *Westmoreland Coal Co.'s Appeal* (1877) 85 Pa. 334; *Kier v. Peterson* (1861) 41 Pa. 357, at p. 361; *Neel v. Neel* (1852) 19 Pa. 323, at pp. 327-328; *Holman's Appeal* (1854) 24 Pa. 174, at p. 178; *Wentz' Appeal* (1884) 106 Pa. 301, at p. 307; *McClintock v. Dana* (1884) 106 Pa. 386, at p. 391.

⁴²*Smith v. City Council of Rome* (1855) 19 Ga. 89, at p. 92; *Dickinson v. Jones* (1867) 36 Ga. 97, at p. 104; Co. Lit. 54b.

⁴³*Payne v. Sheets*, *supra*, footnote 38, at p. 344; *Kennedy Stave etc. Co. v. Sloss Sheffield etc. Co.*, *supra*, footnote 38; *Albright v. Sussex County etc. Comm.*, *supra*, footnote 39; *Wickham v. Hawker* (1840) 7 M. & W. 62, at p. 79; *Ewart v. Graham* (1859) 7 H. L. C. *331; *Post v. Pearsall* (N. Y. 1839) 22 Wend. 425, at p. 441; *Cobb v. Davenport* (1869) 32 N. J. L. 369, at p. 384; *Bingham v. Salene* (1883) 15 Ore. 208, 14 Pac. 523.

⁴⁴*Ex Parte Artis* (1752) 2 Ves. 490; *Anonymous* (1682) 1 Vern. 104; *Lingon v. Foley* (1675) 2 Ch. Cas. 205.

⁴⁵*Ivy v. Gilbert*, *supra*, footnote 23, at p. 19; *Trafford v. Ashton* (1718) 1 P. Wms. 415, at p. 418; see *Evelyn v. Evelyn* (1731) 2 P. Wms. 659, at

one case in ten in which the court has decreed a sale on the words "rents and profits" that it was in harmony with the testator's intentions. Yet to aid a creditor, as he has explained, a sale has often been ordered on the ground that "rents and profits" in a will mean to pass the land.⁴⁶ The general rule in England seems to be that the natural meaning of the word "profits" in this connection is "annual profits", but it should be noted that where the court is not expressly confined to this interpretation, it is construed in its broadest sense to constitute the land itself.⁴⁷

V.

Although American courts do not definitely emphasize the *value concept* of profit as a surplus above the costs of production, it seems, nevertheless, that in the case of speculative ventures and monopolized industries, this view has found its proper niche in the general plan of legal profits. Indeed, a pure value surplus in speculative enterprises has been accepted as legitimate profit in English law since the middle of the seventeenth century; and the clear-cut opinions of these early decisions have been followed in a greater or less degree in our own states. In some respects our state decisions go even farther than the English law; and as economists we are interested here especially in two sets of cases. In the first group, the value surplus is uniformly considered to be profits; in the second, it is unhesitatingly declared to be capital. In this second instance, the courts are apparently undertaking the important task of separating the pure value increment from what appears to them to be the actual or concrete income of an estate.

This concept of profit is, in the first place, readily found in cases which relate to speculation in real estate. As early as 1859 a court in Ontario recognized that the scarcity surplus from a speculative enterprise is a substantial profit. The profits here were to

p. 666; *Mits v. Banks* (1724) 3 P. Wms. 1, at p. 8; *Okeden v. Okeden* (1738) 1 Atk. 550; *Small v. Wing* (1762) 3 Bro. P. C. 503; *Gibson v. Rogers* (1750) Amb. 93, at p. 95.

⁴⁶*Baines v. Dixon* (1747) 1 Ves. 41, at p. 42; see also *Green v. Belchier* (1737) 1 Atk. 505, at p. 506; *Reed v. Reed* (1812) 9 Mass. 372; *Goldin v. Lakeman* (1831) 2 B. & Ald. 30, at p. 42; *Fox v. Phelps* (N. Y. 1837) 17 Wend. 393; *Earle v. Rowe*, *supra*, footnote 3.

⁴⁷Whether or not the land is sold depends upon the general terms of the will, the time allowed for raising the necessary funds, the situation of the estate, the nature of the debt, and the age of the beneficiaries. *Barnardiston v. Carter* (1717) 3 Bro. P. C. 64; *Heneage v. Lord Andover* (1829) 3 Y. & J. 360; *Gore v. Gore* (1722) 2 P. Wms. 28, at p. 63; *Albemarle v. Roger* (1794) 2 Ves. Jr. 477, at p. 483; *Earl of Pomfret v. Lord Windsor* (1752) 2 Ves. *472, at p. 480. *Ivy v. Gilbert*, *supra*, footnote 23.

be divided equally between two partners, one of which furnished the capital while the other selected and purchased desirable tracts of land. It was not clear to the court whether there were actual profits from the sale of the land, or only estimated returns based on its valuation. It was, nevertheless, held that the profit to be divided equally between "the parties was the value, whether ascertained upon re-sale or by valuation, after deducting the cost and incidental expenses."⁴⁸ In a later case in Missouri, which involved two firms engaged in the real estate business, each party to the contract in question was entitled to one half of the "acquisitions beyond expenditures". Citing Webster's Dictionary as authority, the court decided that this expression was a definition of profits, and that in the contract it represented the land as well as the money obtained by the firms from their various deals.⁴⁹ Again, in referring to an investment in wild or unproductive land, the court of Pennsylvania in 1890 expressed the opinion that if the sum for which the speculator sells it "does not exceed the purchase money and interest thereon, he does not realize a profit on the investment."⁵⁰ That is, while the courts of this state seldom include interest in profits, they frequently recognize the speculative increment as such.

In other decisions this idea of profit is not so readily accepted. Thus in the early cases of this same state, which determined the right of the life tenant to the profits of an estate held in trust for the beneficiaries of a will, the pure value surplus of property was considered to be profits;⁵¹ but in a recent case the ground has been taken that such increased value is capital and passes with the estate.⁵² In deciding the same issue, the courts of New York also follow the principle that the right of a life tenant to the profits of an estate does not include the surplus arising simply from an increase in its value.⁵³ But in many decisions the subject matter is so complex that there seems to be no settled definition of profit, and the value increment is often designated either as capital or profits. Thus in 1895 it is conceded by one court of this state that both the

⁴⁸*Proudfoot v. Bush* (Upper Can. 1859) 7 Grant 518, at pp. 522-533.

⁴⁹*Carter v. Arnold* (1896) 134 Mo. 195, at p. 208, 35 S. W. 584.

⁵⁰*Hentz v. Pennsylvania Co.* (1890) 134 Pa. 343, at p. 347, 19 Atl. 685.

⁵¹*Earp's Appeal* (1857) 28 Pa. 368, at p. 374; *Smith's Estate* (1891) 140 Pa. 344, at p. 352; 21 Atl. 438.

⁵²*Hubley's Estate* (Pa. 1884) 16 Phila. 327, at p. 330; *Graham's Estate* (1901) 198 Pa. 216, at pp. 220-221, 47 Atl. 1108; *Kemble's Estate* (1902) 201 Pa. 523, at p. 525; 51 Atl. 310.

⁵³*Matter of Proctor* (1895) 85 Hun. 572, 33 N. Y. Supp. 196.

speculative increment and interest may sometimes be included in profits. "And while the interest or income as well as increased value of the securities", runs the opinion, "may be treated as profit, that term in common parlance is the pecuniary advantage resulting from dealing or trafficking in property."⁵⁴ Almost ten years later a much better definition is included in the opinion of another court of this state. After repeating the prevailing formula that "profit" ordinarily means the excess of returns over expenditures, it "may or may not, according to circumstances", declared the court, "include in the returns any increase in value of the capital, and in the expenditures any depreciation of capital." Lastly, in a more scientific sense, it is said to be the excess which remains after deducting from the returns, not only "the operating expenses and depreciation of capital, but also interest on the capital employed."⁵⁵ The opinions of these last two states represent the most advanced analysis of profits. At least most courts seem to follow no one established rule in determining the entrepreneur's income.

The value concept is also intrenched securely in a large group of decisions involving the collection of profits which have been lost by the nonperformance of a contract. If one party in purchasing commodities or services fails to keep his agreement, the second may suffer two important losses which consist of the (a) expenditures made before the contract was broken, and (b) the prospective profits. It will be noticed that the second item comprises solely future profits—that is, a surplus value over expenses, which may be collected as damages, though it may be entirely unearned. If the claimant cannot furnish direct proof of his ability to secure such prospective returns during the performance of his agreement, or if they are highly speculative in character, they will not be allowed as damages. By this ruling highly speculative gains are eliminated from such contingent profits. But in some instances profits are so certain that they become part and parcel of the contract itself. For example, if one person has agreed to furnish certain goods to another on a particular day at a definite price, but fails to perform his part of the contract, the second person may usually collect the difference between the stipulated price and the market value of the commodities at the time they should have been delivered. It is obvious that the second person has never really earned this profit, but the speculative income becomes none the less a legitimate

⁵⁴Matter of Proctor, *supra*, footnote 53, at p. 573.

⁵⁵Mayer v. Nethersole (1902) 71 App. Div. 383, at p. 388, 75 N. Y. Supp 987.

return.⁵⁶ In like manner, if one person has contracted for definite services, or for the delivery of certain goods at a specified time, and refuses subsequently to keep his agreement, he is usually liable in damages for the difference between the expenses incurred by the plaintiff and what the latter would have received had he been permitted to complete his contract. The Supreme Court of the United States follows a definite rule in estimating the profits to which the plaintiff is entitled in such cases. Damages shall consist of "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."⁵⁷ To be more explicit, the entrepreneur usually makes two forms of expenditures, namely money and personal sacrifice. But as he does not undergo this personal sacrifice in this particular instance in performing his part of the contract, he is only entitled to compensation for his actual losses and to the surplus value which he would have acquired had he been allowed to complete his agreement. Profits of this sort have been collected from the United States because of its failure to carry out its contract in securing supplies for the army; but in repairing the harbor at New Orleans, although the government again failed in its agreement, the entrepreneur was unable to show convincing proof that his profits would have consisted of other than speculative returns.⁵⁸

In still a third set of cases wholly speculative profits may be recovered if companies in which they are properly insured refuse to pay them. The right in England and the United States to insure expected, contingent, or speculative profits has been settled by a long line of rulings which refer usually to losses at sea. This general expectation of profit is a definite entity, susceptible of possessing value and of being sold; it is sometimes insured entirely independent of the value of the cargo, but the latter must be known

⁵⁶*Grainsford v. Carroll* (1824) 2 Barn. & Cress. 624; *Clark v. Pinney* (N. Y. 1827) 7 Cowen 681; *Quarles v. George* (1839) 40 Mass. 400; *Shepherd v. Hampton* (1818) 16 U. S. 200, at p. 204; *Dey v. Dox* (N. Y. 1832) 9 Wend. 129, at p. 134; *Shaw v. Nudd* (1828) 25 Mass. 9, at pp. 13-14; *Leigh v. Patterson* (1818) 8 Taunt. 540.

⁵⁷*United States v. Speed* (1868) 75 U. S. 77, at pp. 84-85.

⁵⁸*United States v. Speed*, *supra*, footnote 57; *United States v. Behan* (1884) 110 U. S. 338, at p. 345, 4 Sup. Ct. 81; see *Hinchley v. Pittsburg Steel Co.* (1887) 121 U. S. 264, at pp. 276-277, 7 Sup. Ct. 875; *Masterson v. Mayor, etc. of Brooklyn* (N. Y. 1845) 7 Hill 74; *Philadelphia, etc. R. R. v. Howard* (1851) 54 U. S. 307, at p. 344; *Fox v. Harding* (1851) 61 Mass. 516; *Hawley v. Corey* (1893) 9 Utah 175, 33 Pac. 695; *Dr. Harter, etc. Co. v. Hopkins* (1892) 83 Wis. 309, 5 N. W. 501.

to determine the actual profits had the merchandise been sold.⁵⁹ English courts usually require the owner of the cargo to show that a definite profit would have been realized from the adventure if the property had not been lost.⁶⁰ He is not allowed to collect imaginary profits or insure the returns of a mere wager.⁶¹ In the United States, on the other hand, the owner of the insured merchandise is not required to furnish this form of proof. In a New York case, Mr. Justice Livingston was positive that "It does not follow that a profit will be made if the cargo arrives; yet its loss would give a right to recover on such an insurance."⁶² It has also been held by a court of the United States that the insured profits on a ship and cargo lost at sea were recoverable without showing that there would have been an ultimate profit if the loss had not occurred.⁶³ Contrasted in other words, the English law does not allow the owner of a cargo to shift market risks upon the insurance company—the latter takes only the risks of the sea; but the law of our own states allows the underwriter to accept both hazards. Certain it is, that in either case a profit consisting entirely of an unearned value or a scarcity surplus may be reaped on such speculative ventures not unlike the gains of the stock market. That is to say, this form of profit is simply "the improved value of the cargo when it has been landed at its destined port";⁶⁴ and, as it may be fully insured against all perils of the sea,⁶⁵ it is plain that the entrepreneur takes only market risks. Yet this form of insurance has been properly legalized by favorable decisions.⁶⁶

It is clear from the preceding discussion that while American jurists have recognized a pure surplus value income, they have not gone far from the idea that profit is a concrete product of land,

⁵⁹*Abbott v. Sebor* (N. Y. 1802) 3 Johns. Cas. *39; *Halhead v. Young* (1856) 6 El. & Bl. 312; *M'Swiney v. Royal Exchange Assurance* (1849) 14 Q. B. 634.

⁶⁰*Hodgson v. Glover* (1805) 6 East 316; *Lewis v. Rucker* (1761) 2 Burr. 1167; *Barclay v. Cousins* (1802) 2 East 544; *Eyre v. Glover* (1813) 16 East *218, at p. *220; *Grant v. Parkinson* (1781) 3 Doug. 16; see *Ionides v. Pender* (1872) 27 L. T. R. 244.

⁶¹Stat. 19 Geo. II, c. 37.

⁶²*Momford v. Hallett* (N. Y. 1806) 1 Johns. *433, at p. *438.

⁶³*Patapsco Insurance Co. v. Coulter* (1830) 28 U. S. *222.

⁶⁴*Halhead v. Young*, *supra*, footnote 60, at p. 324.

⁶⁵*Royal Exchange Assurance v. M'Swiney* (1850). 14 Q. B. 646, at p. 660.

⁶⁶*Barclay v. Cousins*, *supra*, footnote 61, at p. 548; *Craufurd v. Hunter* (1798) 8 Durn. & E. 13; *Lovatt v. Hamilton* (1839) 5 M. & W. *639; *King v. Glover* (1806) 2 Pos. & Pul. N. R. 206; *Flint v. Flemyng* (1830) 1 B. & Ad. 45, at p. 48.

labor or capital. For example, the land itself, its contents, and the chattels upon it, are still considered as profits in modern decisions. Moreover, the theory that the concrete return of the land in the form of soil, minerals, fish and game is a profit in kind, is a doctrine not far different from the legal rent concept; for rent may likewise be paid in land, products or money. In these cases, rent rests, therefore, wholly upon a productivity concept of the profit from land; it still issues out of the land, or is paid out of the profits from it. Also tenements, as distinguished from the stock or chattels on leased premises, are still attached to the land, and rent issues from them as a matter of course. From the stock, however, only profits and interest are obtained, yet as an exception to this rule, the courts in Virginia and Pennsylvania have also attached the rent concept to such chattels. These productivity concepts are a direct inheritance from certain leading cases of the medieval period. Their importance to-day is doubtless largely due to the conservative character of the law. But in reviewing the complex and trying questions which appear before American courts, one is fully impressed by the constant use which is still made of these concepts and the apparent need for their retention.

However, there is a tendency in some states to unite rents, profits, and interest into one income.

"In fine, whatever this business continuously earned as rent or profits or interest or income or profit," concluded a court in New York, "is contemplated and described by the words 'profits and gains' and 'income' used by the testator, for rent is a profit, and profit is a gain; interest is a profit or income; income is a gain or a profit, and profit is a gain, and, generally, whatever is received for the hire or for the use of property is a gain."⁶⁷

In rendering this decision the court left out only the labor and risk concepts of profit—an exception which was probably due to the fact that they were not relevant to a decision of the issue. This excerpt is a timely illustration of the flexibility of the common law and of the use of terms, which preserves so effectively the original profit concepts of medieval decisions. Of course, no real harm is done in recognizing that profits are paid out of land, capital, products or money; but great danger does lie in attributing to these elements the primary cause of profits. By conceding to capital, labor, and land only their respective parts, we may more easily

⁶⁷Thorn v. De Breteuil, *supra*, footnote 26, at p. 417.

accomplish a much needed analysis of the surplus increment which goes to the entrepreneur. But having discounted the effect of these factors upon production, the legalists are obviously puzzled over the exact nature of the surplus which remains after deducting interest and wages of management. This increment is being slowly analyzed and differentiated into its numerous elements; and only recently courts have realized its complex character.

Looking over the whole varied range of legal concepts of profit we may draw several pertinent conclusions:

First, although our courts have more or less discarded the labor concept of profit, except in suits for damages, there still remains sufficient legal authority for an efficiency theory of profits. That is, if we define efficiency profits as the gain arising from reduced costs of production, there are many decisions which in their general context would support this new concept of profit. As recent evolutions in industry have forced upon them new impressions of the magnitude of the residual surplus, less attention has been given to the labor and capital concepts of profit. In several decisions, indeed, it is denied that profits constitute a compensation for the use of capital; in other opinions it is likewise denied that profits form the real compensation of labor. That profits depend on the peculiar powers of both capital and labor, without being exactly a compensation for their services, is doubtless the view of many American judges. As we have observed, this surplus is commented upon in Bouvier's Law Dictionary. It is said there, in referring to the views of the classical economists, that gross profits equal the difference between the value of advances and the value of returns, that the net profit constitutes so much of this difference as may be due solely to the capital employed, and that "the remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name, but it represents the profits attributable to industry, skill and enterprise."⁶⁸ Again, in that branch of the law which controls the use of patented inventions, courts are constantly separating the profits of efficiency from the speculative surplus. If one producer infringes upon the rights of another by using unlawfully simply a patented process in production, the patentee is able to recover only the profits of efficiency. These are determined according to the advantage which the former derives from using the patented device in comparison with any other known method which would have secured exactly the same result.

⁶⁸Bouvier, *loc. cit.*

Secondly, although American jurists do not deliberately or consciously recognize that profits often originate wholly in the increased intensity of demand forces, the value concept of profit has acquired constantly increased importance. For example, courts have realized that in the returns from investments in wild or wholly unproductive land, the profit surpluses are largely speculative and of a much different character from the returns on capital employed in commerce and manufacturing. Again, we have already noted that the life tenant is entitled only to the actual income or earnings from an estate, while the surplus value increment arising from the natural enhancement of property is construed to be capital. The latter is therefore added to the estate. Finally, in the case of monopolies the value surplus is easily recognized. The sudden evolution of trade combinations has revealed many new schemes for controlling the market surplus. And the remarkable interpretations, which have been drawn from the common law in detecting the monopoly increment, has proved the ability of American judges in meeting a most serious problem of modern times. Here at least the courts have recognized that contracts in partial restraint of trade may permit a daily harvest of unearned surpluses.

Thirdly, whether our courts give recognition to an efficiency or a value concept of profit, or to any other of the preceding theories of the entrepreneur's income, such returns may be expressed either in terms of value or of concrete goods. In other words, the legal concepts of profit include all forms of the final product and all concrete factors of production; its unusual scope makes possible, therefore, the most searching inquiry into the earned and unearned increments of the undertaker.

Fourthly, these economic doctrines of the common law are fully as substantial and persistent as other parts of its legal structure. Essentially vital to the present subject is the fact, that they will continue to affect legal reasoning, contractual rights, methods of wealth distribution, and indirectly the economic structure of the community. There is a constant readjustment between the legal and the social structure of economic society, and this change is reflected in *lego-economic* theory. In the English medieval law we have found the legal origin of a labor or cost profit which entered into the expenses of production; but in certain instances modern law has legalized both speculative and monopoly gains arising from the exploitation of market prices. What was bold

robbery in medieval times may have become lawful service and legitimate production to-day. In the evolution from medieval to modern principles, the courts have found it unnecessary to draw a legal distinction between cost profits entering into the costs of production and speculative gains arising from an increased demand. However, in the adjustment of these economic concepts, it is likely that both jurists and statesmen will be forced ultimately to meet the vital lego-economic problem which lies in the separation of cost, speculative and monopoly profits.

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NOTES.

THE UNIFORM PARTNERSHIP ACT—NEW YORK'S FAILURE TO ADOPT IT.—The Uniform Partnership Act was not adopted by the New York legislature at its 1918 session. A bill embodying the uniform law passed the senate, was favorably reported to the assembly by its judiciary committee, and advanced to third reading, but on the closing day of the session was recommitted to the committee.¹ It is understood that the bill's failure was the result more of the rather natural absence of general interest in a bill dealing with a narrow branch of private law than of strong or reasoned opposition. That the law was not adopted in New York is a matter for regret.

¹N. Y. Legislative Record and Index, Jan. 2-Apr. 13, 1918, pp. 7 (# 36), 263 (# 1110).

The plan of embodying the law of partnership in a uniform statute was projected by the Commissioners on Uniform State Laws in 1902 and its committee on commercial law was instructed to present a draft.² Eight printed drafts, prepared between 1903 and 1914, were the result of the labors of the committee and its several draftsmen. The *first*³ and *second*⁴ were the work of the late James Barr Ames.⁵ The two drafts are identical except for a few interpolations. The British Partnership Act, 1890, was followed almost literally. Only seventeen departures from the language of that statute are noted by Mr. Ames in his annotations to the *second* draft. Of these, moreover, only three were of major importance.⁶ One or the other of these drafts was before the committee on commercial law during 1906, 1907 and 1908.⁷ Although in 1908 the draftsman expressed to the conference a doubt as to the feasibility of proceeding with these drafts without modification to meet the difficulties suggested because of the definition of a corporation in the constitutions of several states,⁸ the *second* draft was presented by the committee on commercial law to the commissioners at the 1909 conference,⁹ but no action was taken. After the death of Mr. Ames, William Draper

²25 Am. Bar Ass'n. Rep. 477 (1902); 26 *id.* 501 (1903).

³A broad-margined pamphlet of 24 pages, entitled on its cover "Draft of an Act to Make Uniform the Law of Partnership." This draft is reprinted in Proc. Conf. C. U. S. L., Aug. 22-25, 1906, pp. 236-256, 30 Am. Bar Ass'n. Rep. 440-459. It contains no notes or explanations. It is undated, but was prepared and printed prior to the meeting of the commissioners in August, 1906. Proc. Conf. C. U. S. L., Aug. 22-25, 1906, p. 40, 30 Am. Bar Ass'n. Rep. 243.

⁴A pamphlet of 24 pages (numbered from 13 to 36 inclusive) entitled "Second Tentative Draft of an Act to Make Uniform the Law of Partnership." It is reprinted under the caption "Draft A" in the pamphlet described in footnote 11. It contains brief notes indicating which of the sections are taken from the British Partnership Act, 1890, and which are new. It is undated, but was prepared and printed prior to the meeting of the commissioners in August, 1909. Proc. Conf. C. U. S. L., Aug. 19-23, 1909, p. 114, 34 Am. Bar Ass'n. Rep. 1083.

⁵In 1903 Mr. Ames agreed to draft an act for the committee on commercial law. 26 Am. Bar Ass'n. Rep. 501 (1903). In 1905 he addressed the conference of commissioners and requested instructions. 28 Am. Bar Ass'n. Rep. 732-738 (1905).

⁶§§ 1 and 4 vesting "the legal title" to partnership property in the "firm", and providing for actions by and against the firm in the firm name; § 5 requiring the registration of the firm name; and § 12 providing for the enforcement of the contributory obligation of the partners in respect of the obligations of the firm.

⁷Proc. Conf. C. U. S. L., Aug. 22-25, 1906, p. 40, 30 Am. Bar Ass'n. Rep. 243; Proc. Conf. C. U. S. L., Aug. 22-24, 1907, p. 93, 31 Am. Bar Ass'n. Rep. 1212; Proc. Conf. C. U. S. L., Aug. 21-24, 1908, p. 102, 33 Am. Bar Ass'n. Rep. 1048.

⁸Proc. Conf. C. U. S. L., Aug. 21-24, 1908, p. 37, 33 Am. Bar Ass'n. Rep. 983. As to this difficulty, see J. A. Crane, *The Uniform Partnership Act, A Criticism*, 28 Harvard Law Rev. 762, 778-779 (1915); W. D. Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 *id.* 158, 164-165 (1915).

⁹Proc. Conf. C. U. S. L., Aug. 19-23, 1909, pp. 112-114, 34 Am. Bar Ass'n. Rep. 1081.

Lewis and James B. Lichtenberger prepared in 1910¹⁰ the *third* and *fourth* drafts,¹¹ the former a revision of the *second*, and the latter a departure. These drafts were much discussed before the committee on commercial law,¹² with the upshot that the *fourth* was adopted as the basis for further work.¹³ The *fifth* draft, an elaborate revision of the *fourth*, followed in 1911.¹⁴ It consisted of 52 sections, the substance of all of which except six¹⁵ appears in the Uniform Partnership Act as recommended. The *fifth* draft is fully annotated by its draftsmen, notes the sections which have and those which have not correspondence with sections of the British Partnership Act, 1890, compares the sections with those of the preceding drafts, and indicates the intended departures from existing law. Not infrequently its fuller notes are more valuable than those appearing in the current edition of the Act published by the Commissioners.¹⁶ This draft was discussed at the 1911 conference of the Commissioners¹⁷ and some months later at a meeting of the committee on commercial law.¹⁸ A new draft, the *sixth*,¹⁹ omitting two sections of the old,²⁰ adding another,²¹ and occasionally changing the phraseology was then prepared and recommended for approval to the conference of 1912,²² which devoted three

¹⁰Proc. Conf. C. U. S. L., Aug. 25-29, 1910, p. 142.

¹¹These drafts are printed in a pamphlet of 113 pages, entitled "Tentative Drafts of an Act to Make Uniform the Law of Partnership." The *third* draft is referred to as "Draft B", the *fourth*, as "Draft C." The *second* draft is reprinted under the caption "Draft A". The British Partnership Act, 1890, is also appended. "Draft C" is fully annotated.

¹²Two meetings of the committee on commercial law were held—one towards the end of August, 1910, the other on Feb. 3 and 4, 1911—at which the *third* and *fourth* drafts were considered. Many persons interested and especially well informed as to partnership law were in attendance at the second meeting. The stenographer's minutes cover 306 typed pages. Parts of some of the speeches at each meeting are printed in a pamphlet entitled "Reprint of Discussions before the Committee on Commercial Law of the Conference on Uniform State Laws in Re the Theory on which an Act to Make Uniform the Law of Partnership Should Be Drawn."

¹³Proc. Conf. C. U. S. L., Aug. 23-28, 1911, p. 149, 36 Am. Bar Ass'n. Rep. 923.

¹⁴It is a pamphlet of 75 pages entitled "Draft of an Act to Make Uniform the Law of Partnership." Prefixed is a letter of transmittal, dated July 1, 1911.

¹⁵§ 21 (exemption from liability to third persons by notice); § 22 (fraudulent conveyances); § 23 (continuing guaranties); § 28 (partner engaging in competing business); §§ 51, 52 (process and procedure in actions by and against partners).

¹⁶See footnote 27, *infra*.

¹⁷Proc. Conf. C. U. S. L., Aug. 23-28, 1911, pp. 37-43, 36 Am. Bar Ass'n. Rep. 823-827.

¹⁸Proc. Conf. C. U. S. L., Aug. 21-26, 1912, p. 123, 37 Am. Bar Ass'n. Rep. 1141.

¹⁹A pamphlet entitled "Sixth Tentative Draft of an Act to Make Uniform the Law of Partnership", dated May 4, 1912.

²⁰§§ 21, 23.

²¹§ 49, relating to infant partners.

²²Proc. Conf. C. U. S. L., Aug. 21-26, 1912, p. 123, 37 Am. Bar Ass'n. Rep. 1141.

sessions to a discussion of it.²³ After consideration of the suggestions of the conference the *seventh* draft,²⁴ in form and substance the same as the *sixth*, was submitted by the committee on commercial law to the conference of 1913. Again two sessions were devoted to the act and again it was recommitted to the committee.²⁵ The *eighth* and final draft followed in 1914. It omitted four sections previously included.²⁶ Otherwise it is merely a careful revision as to style of the *seventh* draft. It was with unimportant amendments adopted by the Commissioners and recommended to the states.²⁷ The Act has been adopted in Alaska.²⁸ Illinois,²⁹ Maryland,³⁰ Michigan,³¹ Pennsylvania,³² Tennessee,³³ Wisconsin,³⁴ and Wyoming.³⁵ Valuable discussion of the Act is to be found in recent periodicals.³⁶

²³Proc. Conf. C. U. S. L., Aug. 21-26, 1912, pp. 39, 43, 64; 37 Am. Bar Ass'n. Rep. 1056, 1060, 1081.

²⁴A pamphlet entitled "Seventh Tentative Draft of an Act to Make Uniform the Law of Partnership", dated June 10, 1913.

²⁵Proc. Conf. C. U. S. L., Aug. 26-30, 1913, pp. 39, 51, 38 Am. Bar Ass'n. Rep. 981.

²⁶§§ 22, 28, 51, 52 referred to in footnote 15, *supra*, and § 49 referred to in footnote 21, *supra*.

²⁷Proc. Conf. C. U. S. L., Oct. 14-19, 1914, pp. 30-31, 64-65. The Act as adopted is printed in the proceedings. *Id.* pp. 285-306. Subsequently the act with full annotations was published by the commissioners in a pamphlet entitled "The Uniform Partnership Act", dated Oct. 14, 1914. There are *at least* two subsequent editions of this pamphlet. The first of these corrects erroneous cross-references in § 31 (6) and § 40 (d) and contains an amendment to § 41 (1). The second incorporated the amendment to § 35, the necessity for which was pointed out by J. A. Crane. The Uniform Partnership Act, A Criticism, 28 Harvard Law Rev. 762, 784 (1915); W. D. Lewis, The Uniform Partnership Act—A Reply to Mr. Crane's Criticism, 29 *id.* 291, 311-312 (1916). In this edition the first paragraph of § 36 is omitted by mistake. See pp. 60, 62. There is nothing in the title or general appearance of these three editions to distinguish one from the other. The introductory note prefixed to the pamphlet is inaccurate in detail. Its references to the proceedings are inadequate and sometimes erroneous, and its references to the various drafts are confusing. The date 1909 in the second paragraph of page 3 should read 1906. There were two meetings separated by five months, to consider the *second*, *third* and *fourth* drafts, and not one as stated in the first full paragraph of page 4. See footnote 12, *supra*.

²⁸Laws of 1917, c. 69.

²⁹Laws of 1917, p. 624.

³⁰Laws of 1916, c. 175.

³¹Laws of 1917, No. 72.

³²Laws of 1915, No. 15; and Laws of 1917, No. 42.

³³Laws of 1917, c. 140.

³⁴Laws of 1915, c. 358.

³⁵Laws of 1917, c. 97.

³⁶W. D. Lewis: The Desirability of Expressing the Law of Partnership in Statutory Form, 60 U. of P. Law Rev. 93, (1911); The Uniform Partnership Act, 24 Yale Law Journal 617 (1915); The Uniform Partnership Act, 72 Legal Intelligencer 110, Feb. 12, 1915; The Uniform Partnership Act—A Reply to Mr. Crane's Criticism, 29 Harvard Law Rev. 158, 291 (1915-16). J. A. Crane: The Uniform Partnership Act, A Criticism, 28 *id.* 762 (1915); The Uniform Partnership Act and Legal Persons, 29 *id.* 838

The Act's definition of a partnership³⁷ is as satisfactory as any which has been offered, and in view of the usual tenor of judicial definitions is probably better for a statute than one drafted frankly as a mere description of the common attributes of voluntary associations of several in a business as *co-entrepreneurs*, and not as co-capitalists or co-wage-earners. The following section³⁸ repudiates the doctrine of "partnership as to third persons", which still obtains in New York and one or two other states.³⁹ The obligation of one estopped to deny that he is a partner and his power to act for his ostensible partner, are dealt with in such a way as to dissipate some existing doubts.⁴⁰

The power of a partner to subject his co-partners to obligations and to convey partnership assets is so defined as to permit the execution by him of sealed instruments.⁴¹ The definition also serves in respect of other points to relieve the practitioner of much unprofitable search for old cases of uncertain bearing.⁴²

The obligations of the partners, except for torts and breaches of trust, are declared to be joint;⁴³ but the estate of a deceased partner

(1916). J. B. Lichtenberger, *The Uniform Partnership Act*, 63 U. of P. Law Rev. 639 (1915). S. Williston, *The Uniform Partnership Act, with Some Remarks on Other Uniform Commercial Laws*, 63 U. of P. Law Rev. 196 (1915); J. H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition*, 15 Michigan Law Rev. 609 (1917); E. B. Seymour, *The Uniform Partnership Act, an Appreciation*, 72 Legal Intelligencer, Feb. 19, 1915.

The third edition of F. M. Burdick's, *Partnership* (1917), cites the Act throughout, pointing out its effect.

³⁷§ 6 (1). The present law of New York. *Evans v. Warner* (1897) 20 App. Div. 230, 235, 47 N. Y. Supp. 16; N. Y. Con. Laws, c. 39, § 2. But see footnote 39, *infra*.

³⁸§ 7 (1).

³⁹*Leggett v. Hyde* (1874) 58 N. Y. 272; *Burdick, Partnership* (3d ed. 1917) pp. 50-58.

⁴⁰§ 16. Thus under § 16 (1) it would be clear that the doctrine of *Poilon v. Secor* (1865) 61 N. Y. 456, long-recognized as unsound, but neither followed nor overruled, is not law. The section would also make certain that inaction after knowledge that one has been held out as a partner is not of itself a sufficient basis for an estoppel. Consent to the holding out must be found as a fact. There are no decisions on the point in New York.

⁴¹§ 9 (1). This would probably effect a desirable change in the law of New York. *Smith v. Kerr* (1849) 3 N. Y. 144. What is more important, the sub-division would fix a rule upon a simple point as to which there ought to be no doubt. For an instance of the present confusion, see *Keller v. West* (1886) 39 Hun. 348, 353.

⁴²*E. g.*, § 9 (3d), (3e), state the present law of New York that a partner does not have the power to confess judgment on claims against the partners, nor to submit them to arbitration. However, if they were adopted, excursions into *Abbott's Practice Reports* and *Howard's Practice Reports* would not be so frequently necessary.

⁴³§§ 13, 14, 15. The present law of New York. *Seligman v. Friedlander* (1910) 199 N. Y. 373, 92 N. E. 1047. These sections, however, would be a distinct gain since they would of themselves repeal §§ 6, 36, c. 39, N. Y. Con. Laws, stating in terms that partners are jointly and severally liable. See F. M. Burdick, *Joint and Several Liability of Partners*, 11 Columbia Law Rev. 101 (1911).

is liable for partnership obligations if the partnership assets are insufficient.⁴⁴

By the Act the constituent legal and equitable rights, powers, privileges and immunities of the aggregate called the property in the land, chattels and *choses in action* conveyed to the partners and agreed between them to be subject to the hazards of their business, are distributed among and divided between the partners. No partner has the privilege of sole enjoyment of partnership lands, chattels, *etc.*,⁴⁵ though each has the privilege of possessing them.⁴⁶ The power to alienate the firm assets for a purpose beyond the scope of the firm business is divided between all the partners, *i. e.*, must be exercised by the joint act of all,⁴⁷ but each partner has the power of alienation for a purpose within the apparent scope of the business.⁴⁸ The liability of firm assets to involuntary alienation is confined to judicial process issued to enforce claims against all the partners.⁴⁹ Excepting his right to receive the profits and to receive the value of his share of the surplus upon winding up,⁵⁰ a partner cannot convey his rights, powers and privileges in respect of the assets.⁵¹ Nor, excepting his right to the profits and surplus, are his rights, *etc.*, in the assets subject to legal process issued to enforce his separate debts.⁵² A partner's right to profits and surplus may be voluntarily alienated by him,⁵³ and may also be taken under legal process against him,⁵⁴ but the process is by a charging order,⁵⁵ the operation of which is similar to that of an order reaching equitable assets in proceedings supplementary to judgment under the New York Code.⁵⁶ All of a partner's rights, *etc.*, in partnership assets—land as well as chattels—except his right to profits and surplus, survive upon

⁴⁴§ 36 (4). The present law in New York. *Voorhis v. Child* (1858) 17 N. Y. 354; Code Civ. Proc. § 758.

⁴⁵§ 25 (2a); see also § 38 (1). The present law of New York. See footnote 61, *infra*.

⁴⁶§ 25 (2a). The present law of New York.

⁴⁷§ 25 (2b). The present law of New York.

⁴⁸§§ 9, 10. The present law of New York, except as to real property conveyed to the partners in the firm name as authorized by § 8. Such property may under § 10 (1) be alienated by the deed of any partner executed in the firm name, if the conveyance is within the apparent scope of the firm business.

⁴⁹§ 25 (2c). See footnote 52, *infra*, as to effect on the law of New York.

⁵⁰§§ 26, 27, 38. This right a partner may assign under the present law of New York.

⁵¹§ 25 (2b). The present law of New York. *Menagh v. Whitwell* (1873) 52 N. Y. 146.

⁵²§ 25 (2c). This would effect a very desirable change in the law of New York which permits a levy on the assets in such a case, *Smith v. Orser* (1870) 42 N. Y. 132, but forbids a sale, except of the partner's right to profits and surplus. *Michalover v. Moses* (1897) 19 App. Div. 343, 46 N. Y. Supp. 456. See Code Civ. Proc. §§ 1413-14. The sale of the partner's right to profits and surplus will not be enjoined until the ascertainment of its value by an accounting. *Moody v. Payne* (N. Y. 1817) 2 John. Ch. 548.

⁵³§ 27. The present law of New York.

⁵⁴§ 28. The present law of New York. See footnote 52, *supra*.

⁵⁵§ 28. A desirable change in New York law. See footnote 52, *supra*.

⁵⁶Code Civ. Proc. § 2432 *et seq.*

his death to the surviving partner.⁵⁷ The widow takes nothing by way of dower.⁵⁸ The deceased partner's right to profits and surplus passes to his personal representative for distribution.⁵⁹ An alienation, except upon death, of the right to profits and surplus does not operate as a dissolution.⁶⁰ Upon winding up, a partner has no right to receive any part of the assets—whether chattels or land—in specie, but has the right to have them sold and to receive the value of his share in money.⁶¹

The Act provides that when the partnership business is continued, by a partner, either alone or in partnership with third persons, without winding up or liquidation, after dissolution caused by the death or retirement of his co-partner, or by the admission of a third person as a partner, the assets of the new partnership shall be liable for the obligations of the dissolved firm as well as for the obligations of the new;⁶² but of course no duty to pay the old obligations is imposed upon third persons unless they have contracted to pay them.⁶³ Similarly, if all the partners convey all their rights, *etc.*, in the firm assets to third persons who contract to pay the firm obligations and continue the business of the dissolved partnership, in addition to the contractual duty to pay, the Act subjects the assets of the persons continuing the business to a liability for the payment of obligations of the dissolved firm.⁶⁴ If, however, the partners convey to third persons who do not assume the obligations of the dissolved firm, the Act imposes upon the third persons and their assets neither duty nor liability. In such a case, the creditors of the dissolved firm are left to their rights against the partners and to their powers over the assets conveyed, under the statutes and com-

⁵⁷§ 25 (2d). The present law of New York, except that under § 25 (2d) if the partners are co-tenants of a legal estate in land, the "legal title" survives to the surviving partner, and does not descend to the heirs of the deceased "in trust" for the surviving partner, as at present. *Delmonico v. Guillaume* (N. Y. 1845) 2 Sand. Ch. 366. This would be a wise change in the interest of expedition and simplicity.

⁵⁸§ 25 (2e). The present law of New York as to inchoate dower. *Hauptmann v. Hauptmann* (1904) 91 App. Div. 197, 86 N. Y. Supp. 427. See footnote 59, *infra*.

⁵⁹§ 26 (last clause). The present law of New York except as to land. At present the widow and heirs, and not the personal representative, are entitled to such partnership real property as it is not necessary to sell to pay creditors and to adjust the claims of the partners. *Darrow v. Calkins* (1897) 154 N. Y. 503, 49 N. E. 61.

⁶⁰§§ 27, 28. These sections settle in a desirable way a point of doubt. Probably, under the existing law of New York a dissolution would be effected by such an alienation. *Marquand v. N. Y. Mfg. Co.* (N. Y. 1820) 17 Johns. 525.

⁶¹§ 38 (1). This section would probably change the law of New York as to real property. See 30 Cyc. 665-666. *Cf.* footnote 59, *supra*.

⁶²§§ 41 (1-3), (5-6), 17. This would effect a change in the law of New York. At present under such circumstances the assets of the new firm—even such of them as were assets of the old—are not subjected to a liability for obligations of the dissolved partnership. *Service v. McDonnell* (1887) 107 N. Y. 260, 14 N. E. 314.

⁶³§§ 41 (7), 17. The present law of New York. *Flour City Nat'l. Bank v. Widener* (1900) 163 N. Y. 276, 57 N. E. 471.

⁶⁴§ 41 (4). This would effect a change in the law of New York similar to that stated in footnote 62, *supra*. See *Stanton v. Westover* (1886) 101 N. Y. 265, 4 N. E. 529.

mon law as to conveyances in fraud of creditors.⁶⁵ For the further protection of creditors of the dissolved firm, in all of the above cases they are given a priority over separate creditors of the partners with respect to claims⁶⁶ of the partners for the consideration for the conveyance of the assets.⁶⁷

The sections of the Act dealing with dissolution contain several provisions of especial interest. Dissolution of a partnership for a fixed term may be caused at any time by the will of any one of the partners.⁶⁸ But the other partners are privileged to continue the business with the partnership assets, upon giving a bond to pay him the value at that time of his right to profits and surplus—less the damages resulting from his breach of contract—and to indemnify him against existing and future obligations.⁶⁹ Notice of dissolution is necessary in case of dissolution by death, or bankruptcy.⁷⁰ An “active” dormant partner, in the absence of notice of dissolution, continues chargeable as a partner.⁷¹ A partner’s right to an account is declared to accrue at the date of dissolution, in the absence of agreement to the contrary, and the running of the Statute of Limitations would accordingly begin at that date.⁷²

In formulating the rules for judicial distribution of partnership and separate assets among the firm and separate creditors, the exceptional case where there are no firm assets and no living solvent partner is not provided for, with the result that even in that case the power of the separate creditors to subject the separate assets to the payment of their claims has priority over that of the firm creditors.⁷³ This is an adoption of the present rule under the Bankruptcy Act.⁷⁴ By the same section, a solvent partner who has satisfied all the partnership obligations and liabilities, is postponed to the other separate creditors in the distribution of the insolvent partner’s assets.⁷⁵

⁶⁵§ 41 (9). There is no section in the Act providing for fraudulent conveyances. A section on the subject was omitted in view of the commissioners’ plan to propose a uniform act covering the whole field. W. D. Lewis, *The Uniform Partnership Act—a Reply to Mr. Crane’s Criticism*, 29 *Harvard Law Rev.* 291, 297 (1916).

⁶⁶§ 42.

⁶⁷§§ 41 (8), 42. Such priority would be new in the law of New York.

⁶⁸§ 31 (2). This would settle a point in the law of New York on which there is almost no authority, *Ferrero v. Buhlmeier* (1867) 34 *How. Pr.* 33, in accordance with the general rule in this country. 30 *Cyc.* 651.

⁶⁹§ 38 (2b).

⁷⁰§§ 34 (b), 35 (1b). In such cases a notice is not now required. *Dexter v. Dexter* (1899) 43 *App. Div.* 268, 60 *N. Y. Supp.* 371. The adoption of the section would result in an improvement.

⁷¹§ 35 (2b). The present law of New York. *Elmira, etc., Co. v. Harris* (1891) 124 *N. Y.* 280, 26 *N. E.* 541.

⁷²§ 43. This section would make certain a point upon which the New York cases are far from clear. See *Gray v. Green* (1891) 125 *N. Y.* 203, 26 *N. E.* 253, s. c. (1894) 142 *N. Y.* 316, 37 *N. E.* 124; *Gilmore v. Ham* (1894) 142 *N. Y.* 1, 36 *N. E.* 826.

⁷³§ 40 (h).

⁷⁴*Farmers’ & Mechanics’ Nat’l. Bank v. Ridge Avenue Bank* (1916) 240 *U. S.* 498, 36 *Sup. Ct.* 461.

⁷⁵§ 40 (i). This section would settle a point upon which the little authority in New York is conflicting. To the effect that the solvent partner is postponed is *Kirby v. Carpenter* (*N. Y.* 1849) 7 *Barb.* 373. *Payne v. Matthews* (*N. Y.* 1836) 6 *Paige* 19 is *contra*.

A careful study of the Act convinces one that many more ghosts would be laid by it than are likely to be raised. The doctrine of "partnership as to third persons" would be swept away. The law as to partnership property would be intelligibly stated and very much simplified. The duties of persons continuing the firm business after dissolution but without winding up or liquidation, are so defined as to greatly improve the existing law. On the whole there can be little doubt that the adoption of the Act would be a long step forward in the development of the law of partnership in New York.

U. M.

THE DOCTRINE OF CONTINUOUS VOYAGE AS APPLIED TO CONTRABAND.—Perhaps the most perplexing problem which Great Britain has had to solve in her effort to effect the "economic strangulation" of Germany is to prevent the flow of supplies through adjacent neutral countries; but an effective weapon in the hands of her prize courts has been the so-called doctrine of "continuous voyage", or, perhaps more accurately, of "ultimate destination". It is a fundamental principle of international law that *bona fide* commerce between neutrals may not be interfered with;¹ likewise, neutrals may trade freely with belligerents, subject only to the belligerent rights of blockade and stoppage of contraband.² However, merchants engaged in evading the rules of blockade and contraband often resort to clever subterfuges to give their traffic the appearance of *bona fide* neutral trade, a common device being a colorable importation into a neutral country from which transshipment to the actual destination can more easily be effected. It is to defeat such ruses that the doctrine of "continuous voyage" is invoked by belligerent prize courts.³ The doctrine consists, not in applying a fiction, but in unmasking a fiction; in hacking through a net work of shams to the *bona fides* of a transaction.⁴

What elements must concur to constitute a shipment a "continuous" transportation is often difficult to determine. The generally accepted test is, whether the goods were intended for incorporation into the common stock of the neutral country.⁵ Sir Edward Grey,

¹See *The Dolphin* (D. C. 1863) 7 Fed. Cas. 3,975 at p. 869; American note to Great Britain of Dec. 26, 1914, 9 Am. Jour. Int. Law, Special Supp. 56, and British reply of Jan. 7, 1915, *ibid.* 60. Compare the extreme view of belligerent rights as stated by Prince Bismarck, *ibid.* 80; see *The Bermuda* (1865) 70 U. S. 514, 551-552.

²7 Moore, Digest § 1179; see: article by James Brown Scott, 8 Am. Jour. Int. Law 302-5; *The Peterhoff* (1866) 72 U. S. 28, 56; *The Bermuda*, *loc. cit.*; opinion of Marshall, C. J., in *The Commercen* (1816) 14 U. S. 382, 399; American note to Great Britain of March 30, 1915, 9 Am. Jour. Int. Law, Special Supp. 117.

³For the origin and development of the doctrine, see 7 Moore, *op. cit.* §§ 1180, 1255-1263; Naval War College, Int. Law Situations, 1901, 41-85; Naval War College, Int. Law Topics and Discussions, 1905, 77-106.

⁴"When the truth is discovered, it is according to the truth, and not according to the fiction, that the question is to be determined." *The Dolphin*, *loc. cit.*; see *The William* (1806) 5 C. Rob. 385, 391-397; *The Bermuda*, *supra*, at p. 555; *The Commercen*, *supra*, at p. 392.

⁵See *The Bermuda*, *supra*, at pp. 551-552; *The Peterhoff*, *supra*, at p. 59; *The Springbok* (1866) 72 U. S. 1, 25; *The Kim* (1915) 3 Lloyd's Prize Cases 167, 359, 32 T. L. R. 10. The practical application of this test in Lord Stowell's time is illustrated in *The Maria* (1805) 5 C. Rob. 365; *The Thomyris* (1808) Edward's Admiralty 17; *The William*, *supra*; and *The Polly* (1800) 2 C. Rob. 361.

in his instructions to the British delegates to the London Naval Conference of 1909, held the doctrine applicable only to a single mercantile transaction preconceived from the outset.⁶ It would seem that there must be something in the nature of a "through shipment", in which the ostensible neutral consignee is essentially a forwarding agent, and that there must be an enemy principal, disclosed or undisclosed, who has an interest in the goods. It is not enough that the goods may, in the ordinary course of trade, find their way to the enemy: if there has been a genuine sale to a neutral consignee whose intention is merely to sell in the best market, the continuity of the shipment is broken, though the best market be in the enemy country.⁷

An extreme belligerent view of the doctrine is presented in a recent British prize case, *The Bonna* (1918) 34 T. L. R. 276, involving a cargo of cocoanut oil consigned to Swedish manufacturers to be made into margarine for consumption in Sweden. Cocoanut oil had been declared conditionally contraband.⁸ The argument for the Crown was based upon Sweden's trade statistics, showing an increase, since the war, in imports of raw materials for margarine, and a corresponding increase in exports of butter to Germany. Butter and margarine, it was urged, constituted one reservoir of edible fats: the manufacture of margarine for home consumption released butter for export to Germany; if the outgoing fats—butter—could be seized as conditionally contraband, the incoming supply—margarine—could also be seized, under the doctrine of "continuous voyage", and not only the finished product but the raw materials as well. The court rejected this novel theory and decreed restitution, but Sir Samuel Evans laid down two noteworthy *dicta*. The doctrine would apply, he declared, if it appeared in the principal case, either that the claimants were acting in combination with particular butter producers with the object

"When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of 'continuous voyage' consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hope of finding a market there for delivery elsewhere." Parliamentary Papers, 1909, No. 4 at p. 7, quoted in argument in *The Kim*, *supra*, 3 Lloyd's Prize Cases at p. 219. See *The Maria*, *supra*, at p. 372; *The Polly*, *supra*, at p. 369. Probably it is not essential that the transaction be complete at the beginning of the voyage, if the goods have acquired a hostile destination at the time of capture. See *The William*, *supra*, at p. 398.

⁷See Sir Edward Grey's instructions, *supra*, footnote 6; *cf.* *The Maria*, *supra*, at p. 372; see *The Peterhoff*, *supra*, at p. 59. In two of the *Mata-moras* Cases, portions of the cargoes consisted of Confederate uniform cloth, which was almost certain to be resold to the enemy. *The Science* (1866) 72 U. S. 178; *The Volant* (1866) 72 U. S. 179. Even in *The Kim*, *supra*, in which presumptions of hostile destination were raised which virtually placed the burden of proof upon the claimants, the goods consigned to Christensen and Thorgersen were released, although the court found that there was no doubt "that Christensen and Thorgersen did sell large quantities to Germany of goods imported from the American Meat Packers." (p. 335). *Cf.* *Hobbs v. Henning* (1864) 17 C. B. (N. S.) 791.

⁸Proclamation of March 11, 1915, Manual of Emergency Legislation, Supp. 3, 306.

of manufacturing margarine in order to release butter for Germany; or that cocoanut oil was imported by the claimants with the intention of supplying the enemy with the margarine.

The greatest weakness in the argument of the Crown is its failure to show an enemy destination of the specific goods, which is the *sine qua non* of contraband.⁹ The fact that the margarine was for home consumption is an insurmountable difficulty. The "edible fats reservoir" theory is, nevertheless, an ingenious effort to identify the imports of cocoanut oil with the exports of butter and thus to impute to the one the enemy destination of the other. The theory evidently rests upon an attempted analogy to the case of fungible goods. It would probably be argued that a cargo of wheat consigned to Sweden but warehoused *en route* in an elevator with other wheat consigned to Germany would thereby acquire an enemy destination. Even assuming this argument to be sound, it breaks down when applied to non-fungible goods. The distinctive characteristic of fungibles is that the individual units lose their identity when mingled with the mass. But take the case of a cargo of flour in barrels for Sweden warehoused with other flour consigned to Germany. Here, while the individual barrels may resemble one another, it is possible to identify the separate shipments and to say which is going to Germany and which to Sweden, so that an enemy destination cannot possibly be imputed to the latter. But there is an even wider gulf between the wheat case and the contention of the Crown; for, in the principal case, not only were the goods different in kind, whatever their resemblance in food value or economic use, but they were not even placed in the same warehouse. To sustain the theory therefore requires the application of a broader principle, by which the trade of a nation is regarded as an economic unit, and the country itself as one vast warehouse, in which the individuality of its imports and exports is merged in the generality of trade statistics.¹⁰ This conception is so bold that it deserves analysis. The offence of carrying contraband is peculiarly an individual one.¹¹ The penalty is restricted to the confiscation of the particular goods: it does not attach to the person of the owner, nor even to his other property.¹² It is almost as if the goods themselves were treated as the offender. But the argument of the Crown seeks to fix upon the importer a personal responsibility, like the guilt of an accessory to a crime, for the export of butter to Germany, and to levy execution upon his property in general. But, if innocent goods

⁹ Moore, *op. cit.* § 1255; see The *Commercen*, *supra*, at p. 388; The *Imina* (1800) 3 C. Rob. 167; *Hobbs v. Henning*, *supra*; *Seymour v. Ins. Co.* (1872) 41 L. J. (N. S.) C. P. 193.

¹⁰The inference from trade statistics was strongly pressed in The *Kim*, *supra*; cf. The American note of Oct. 21, 1915, dealing with this case, 10 Am. Jour. Int. Law, Special Supp. 73 *et seq.*, especially at p. 78; see also the British memorandum of Oct. 12, 1915, *ibid.* 69, and note of April 24, 1916, *ibid.* 120, especially at p. 133.

¹¹The principle seems to be that the neutral shipper is, in his private capacity, guilty of an unneutral act. See 7 Moore, *op. cit.* § 1263; *Seymour v. Ins. Co.*, *supra*, at p. 196; cf. opinion of Marshall, C. J., in The *Commercen*, *supra*, at p. 402.

¹²This statement does not overlook the cases where either the vessel or other goods of the owner in the same cargo are confiscated. The latter rest upon the principle of "infection", and the former upon the theory that the ship is itself being used for an unneutral purpose. See 7 Moore, *op. cit.* § 1263.

of the same owner are exempt from seizure, how can he be penalized for the conduct of merchants over whose actions he has no control? If the Crown's contention is admitted, there can be no such thing as *bona fide* neutral commerce in an article on the contraband list. Once it appears that some merchants in a country are selling that article to the enemy, all trade in the product becomes *ipso facto* contraband, and even goods destined for home consumption may be seized. This amounts to saying that the neutral nation is forbidden to permit trade with the enemy in the inhibited article.¹³ Accept this principle, and the conclusion is not far removed that the neutral government is bound to prevent such trade,¹⁴ a conclusion involving a radical departure from the present rule.¹⁵

The first *dictum* is the "edible fats reservoir" theory reduced to the scale of the individual merchant, the chief difference being that here the identity of the transaction is not merged in the "economic unity" of trade statistics. Sir Samuel Evans apparently thought that, by linking up the importers of cocoanut oil with the exporters of butter through a contract relation, responsibility for the butter trade might be fixed upon the former. But this still does not obviate the difficulty that the offence and penalty of contraband inhere peculiarly in the contraband articles themselves and are not even transferable to innocent goods of the same owner. Moreover, it is indisputable that this was *bona fide* neutral trade: whatever may be said of the butter, the margarine was to be consumed in Sweden; and shipping cocoanut oil to Sweden is obviously not the same thing as exporting butter to Germany. The essential elements of a "through shipment" to an enemy destination are lacking.

The second *dictum* presents a much closer case, in that here the margarine itself was intended for the German market. But, in an earlier case, Sir Samuel Evans apparently thought the intervention of a manufacturing process in which the raw materials lose their identity and become part of a totally different product sufficient to constitute an incorporation into the common stock of the country.¹⁶ At least no court, it is believed, has ever applied the doctrine of "continuous voyage" to a case where the goods were not contraband at the time of capture. Otherwise, were the finished product contraband and the raw materials on the free list, the latter could be seized, on the ground that their importation was part of a single transaction the object of which was to supply the enemy with contraband. Furthermore, a mere intention of supplying the enemy is insufficient to stamp

¹³As a matter of fact, the practical effect of belligerent measures during the present war has been virtually to force such neutral countries as Holland into this very predicament. Compare, *e. g.*, the organization of the Netherlands Overseas Trust.

¹⁴Compare the Central Powers' contention regarding the American munitions traffic with the Entente Allies, and the State Department's reply. 9 Am. Jour. Int. Law, Special Supp. 125, 127, 146, 166.

¹⁵*Cf.* 7 Moore, *op. cit.* § 1308.

¹⁶"It was said that as to the lard * * *, it was to go through a refining process at Esbjerg. Whether afterwards the refined lard would have been sent to Germany is immaterial upon the question now before the Court, if it was at the time of seizure on its way to Denmark to a purchaser, who intended to put it through a manufacturing process there." The *Kim*, *supra*, at p. 328.

the transaction as a "continuous voyage", so long as the manufacturer is free to sell his product in a neutral market, if he chooses.¹⁷

It should be noted that to sustain either the argument of the Crown or the *dicta* of the court requires the adoption of a fiction, which, as has been seen, violates the very spirit and purpose of the doctrine of "continuous voyage".

In the foregoing discussion no attempt has been made to differentiate between the two classes of contraband.¹⁸ The fact, however, that the goods, in the principal case, were conditionally contraband¹⁹ increases the difficulty of maintaining the theories advanced; since it must be proved, not only that the goods were destined for Germany, but that they were consigned to the armed forces as well.²⁰ The Declaration of London²¹ undertook to abolish the doctrine of "continuous voyage" with reference to goods conditionally contraband,²² while recognizing it as to goods absolutely contraband.²³ Aside from the increased difficulty of proving a hostile destination of the former, however, there seems to be little basis in principle for this distinction,²⁴ which is not now made under the accepted rules of international law. On the other hand, attempts have been made, both in this and in previous wars, to abolish all distinctions between the two classes of contraband.²⁵

¹⁷The Science, *supra*; The Volant, *supra*.

¹⁸See 7 Moore, *op. cit.* § 1250; Wheaton, International Law (5th ed. by Phillipson) 714-716.

¹⁹The term "conditional contraband" seems misleading, in that it is apt to suggest that the article is to be treated as *prima facie* contraband merely upon proof that it is destined to a belligerent country, thus throwing upon the claimant the burden of exculpation; whereas no question of contraband can be raised until a warlike purpose is proved. See Lord Salisbury's statement in the Delagoa Bay Cases, 7 Moore, *op. cit.* § 1262 at p. 744; *cf.* Wheaton, *loc. cit.*

²⁰United States Naval War Code of 1900, Sec. VI, Art. 34, Naval War College, Int. Law Discussions, 1903, 111; The Jonge Margaretha (1799) 1 C. Rob. 189; The Ranger (1805) 6 C. Rob. 125; The Edward (1801) 4 C. Rob. 68; The Zeiden Rust (1805) 6 C. Rob. 93; *cf.* The Frau Margaretha (1805) 6 C. Rob. 92.

²¹As to the status of the Declaration, see Naval War College, Int. Law Topics, 1915, 93-117.

²²Art. 35, Naval War College, Int. Law Topics, 1909, 85.

²³Art. 30, Naval War College, Int. Law Topics, 1909, 75.

²⁴The provision in the Declaration of London seems to have been the result of a compromise. See article by James Brown Scott, *supra*, at pp. 312-316; Wheaton, *op. cit.* 745.

²⁵*Cf.* British White Paper of April 13, 1916, 10 Am. Jour. Int. Law, Special Supp. 52. Sir Edward Grey, in his note of Feb. 10, 1915, 9 Am. Jour. Int. Law, Special Supp. 80, declared: "In any country in which there exists such a tremendous organization for war as now obtains in Germany there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country." This would seem to be a step tending towards a return to the now obsolete conception of war as a conflict between the entire populations of belligerent states rather than between their armed forces merely. *Cf.* 2 Oppenheim, International Law 59.

It has been urged that some extension of the old doctrine of "continuous voyage" is necessary, in view of the unusual conditions of modern warfare.²⁶ To what extent belligerent measures in the present conflict will be recognized as precedents²⁷ after its termination cannot be predicted; but, if the attitude of our own Government during our period of neutrality affords any indication,²⁸ there is apt to be a reaction in favor of the enlargement of neutral rights and the curtailment of belligerent privileges. At any rate, the acceptance of the doctrines advanced in the principal case will require a decided modification of the existing rules of international law.

IS INTERESSE TERMINI NECESSARY?—The expression *interesse termini* is applied to denote the interest which a lessee has before he enters into possession of the demised premises. The interest is executory in character, and covers two classes of cases—first, where a lease *in praesenti* is executed, *i. e.*, where the lessee has an immediate right to possession but does not enter; second, where a lease *in futuro* is made, *i. e.*, the term is to commence at some future date and the right to possession is postponed until such time.¹ To understand the origin and nature of this interest it is necessary to refer briefly to the status of a leasehold estate at early common law. Originally the rights of a lessee were all rights *in personam* against his lessor. If the lessor failed to deliver possession of the premises to him, he could not bring a real action; his sole remedy was an action for breach of covenant.² Since the right to enter was purely contractual it would seem to follow, under the doctrine that choses in action were non-assignable, that if the lessee died before entry, such right would terminate with his death. It was perhaps to meet this situation that *interesse termini* was created—an interest which, in so far as it was transferable,³ by deed or will as well as by interstate succession,⁴ had some of the features of a right *in rem*,

²⁶See British note of Feb. 10, 1915, 9 Am. Jour. Int. Law, Special Supp. 72 *et seq.*; *cf.* British note of July 24, 1915, *ibid.* 158 *et seq.*, and memorandum of July 7, 1916, 10 Am. Jour. Int. Law, Special Supp. 7.

²⁷Great Britain, while admitting that some of her measures overstep the bounds of international law, has defended them upon the ground of retaliation. *Cf.* Note of Feb. 19, 1915, 9 Am. Jour. Int. Law, Special Supp. 176 *et seq.*

²⁸For the diplomatic correspondence containing our defence of neutral rights, see 9 and 10 Am. Jour. Int. Law, Special Supps.; also Moore, Principles of American Diplomacy, Chap. II, especially at pp. 67-101. Our Government has consistently urged the exemption of all private property at sea from capture. See Naval War College, Int. Law Topics, 1905, 9-20.

¹Comyns, Dig. Estates by Grant (G14). *Edge v. Stafford* (1831) 1 C. & J. 391.

²Bracton, Book IV, c. 34, fol. 220; see *Wilcox v. Bostick* (1900) 57 S. C. 151, 35 S. E. 496.

³*Wheeler v. Thorogood* (1588) Cro. Eliz. 127. "But the lessee before entry hath an interest, *interesse termini*, grantable to another." Co. Litt. 46b. See *Whitney v. Allaire* (1848) 1 N. Y. 305.

⁴"And so if the lessee dieth before he entered, yet his executors or administrators may enter." Co. Litt. 46b.

but which nevertheless was not an estate or right in land but simply a right to the possession of land.⁵

With the evolution of a leasehold estate from a mere right *in personam* into a right *in rem*,⁶ the need for an interest such as *interesse termini* is no longer apparent. Where a lease is made to commence *in futuro*, at the expiration of a prior estate, the case is similar to that where a tenant in fee simple conveys to A for life with remainder to B in fee. In the latter case B has a vested estate with all the remedies necessary to its protection. Despite the rigid requirement of livery of seisin at common law, B would not have to enter into possession in order to perfect his right. He could assign his interest, or upon his death it would descend to his heirs. At the termination of the life estate the assignee could enter upon the land. To have clothed the remainderman with an intervening interest⁷ would not, therefore, have served any useful purpose; for, subject to the rights of the tenant in possession, the remainderman already had all the rights which the law then accorded to the owner of a well recognized proprietary interest. It may be argued that at common law, in the case of a conveyance to A for life, or in fee, A actually had to enter on the property before title would pass to him and that the same would be true in the case of a lease *in presenti*. And such was the law.⁸ But after the Statute of Uses,⁹ physical entry became unnecessary. As a result of the statute, title could be conveyed without livery of seisin or transmutation of possession. The operation of the statute was not limited to estates in freehold, but extended as well to a lease by way of bargain and sale, and the lessee was in of his term without having entered upon the premises.¹⁰ As a result, the lease and release assume great importance as an effective means of circumventing the Statute of Inrolments¹¹ and soon became the almost universal method of conveyancing.

After the Statute of Uses¹² and the creation of the remedy of ejectment, a leasehold estate possessed, for all practical purposes, the attributes of a freehold,¹³ but this fact has never given judicial recognition. In the recent case of *Mann, Crossman, & Paulin, Ltd. v. Registrar of the Land Registry* (1917) 117 L. T. R. (N. S.) 705, the novel question was raised as to whether a reversionary lease limited to begin after the period allowed by the Rule against Perpetuities was in violation of the rule. The court held that the Rule was not violated; but instead of recognizing *interesse termini* as an archaic survival which has no place in our present jurisprudence seemingly based its judgment on the ground that *interesse termini* was itself a vested property right. If the

⁵*Saffyn v. Adams* (1602) Cro. Jac. 60; see *Llangattock v. Watney, Combe, Reid & Co., Ltd.* [1910] 1 K. B. 236, 246.

⁶3 Bl. Comm. *200 *et seq.*; 2 Pollock & Mait., Hist. Eng. Law 106 *et seq.*

⁷The phrase *interesse termini* is not used with regard to a freehold lease. *Ecclesiastical Comm'rs. v. Tremer* [1893] 1 Ch. 166.

⁸*Miller v. Green* (1831) 8 Bing. 92; Williams, Real Property (22nd ed.) 201.

⁹27 Hen. VIII, c. 10.

¹⁰*Lutwich v. Mitton* (1620) Cro. Jac. 604.

¹¹27 Hen. VIII, c. 16.

¹²It must be noted, however, that the Statute of Uses applied only to a lease by way of bargain and sale.

¹³The introduction of the fiction of entry in the action of ejectment was a further step in this direction. See 3 Bl. Comm. *203.

court regarded *interesse termini* as an estate then its reasoning seems unsound; for although courts and early writers have declared *interesse termini* to be assignable they have expressly repudiated the notion that it was an estate. It was considered only as a right to an estate.¹⁴ Furthermore, if it is a property right but something less than an estate the answer given by the court does not solve the question as to whether or not the future limitation of the term is too remote. Following the analogous reasoning suggested in cases of an option for the purchase of land,¹⁵ or a right of entry upon condition broken,¹⁶ it would appear that the lease in question did violate the Rule.¹⁷

But to limit in this manner the creation of leasehold estates would be to lose sight of the present status of such property in our law, together with its historical background, and would mean the application of principles better adapted to a medieval system of land tenure.¹⁸ It is sub-

¹⁴*Saffyn v. Adams*, *supra*; see *Wood v. Hubbell* (1853) 10 N. Y. 479; *Copeland v. Stephens* (1818) 1 B. & Ald. *593, *605; 1 Platt, Leases 22. The doctrine of merger did not apply; *Doe d. Rawlings v. Walker* (1826) 5 B. & C. 111; nor was the interest subject to a judgment lien. *Crane v. O'Connor* (N. Y. 1844) 4 Edw. Ch. *409.

¹⁵*London & Southwestern Ry. v. Gomm* (1882) 20 Ch. D. 562. The Rule against Perpetuities does not apply to renewal of leases. *Hare v. Burges* (1857) 4 K. & J. 45, but it does apply to an option contained in a lease for the purchase of the land in fee simple. *Woodall v. Clifton* [1905] 2 Ch. 257.

¹⁶*In re The Trustees of Hollis' Hospital & Hague's Contract* (1899) 2 Ch. 540; see *Dunn v. Flood* (1883) 25 Ch. D. 629.

¹⁷*In Redington v. Browne* (1893) 32 Ir. L. R. 347, a lease like the one in the principal case was held not to violate the Rule. The validity of a similar lease was assumed in *Smith v. Day* (1837) 2 M. & W. *684. Text writers have generally considered a reversionary lease to be within the rule. See Lewis, *Law of Perpetuity* *614; Fearn, *Contingent Remainders* (10th ed.) 611; 1 Key & Elphinstone, *Precedents in Conveyancing* (10th ed.) 1073, n. (b); but see 1 Jarman, *Wills* (6th ed.) 307.

A limitation though transmissible may nevertheless not be vested. *Hawkins, Wills* (2nd ed.) c. 18. Thus in the case of an executory devise of a fee after a prior gift in fee, the interest of the second donee is descendible and assignable; but should it be dependent upon a contingency which may not occur within the prescribed period permitted by the Rule against Perpetuities it is void in its inception. A gift of a chattel may be made at the present time but to take effect twenty-five years hence, in which case the grantee gets no vested interest, and the Rule is again violated. The lease in question may fall into one of these two groups. Since, however, the Rule against Perpetuities is based on public policy such technical reasoning ought not to be applied so as to defeat every kind of limitation regardless of its consequence. If a lease for a term of fifty years or a lease for twenty-five years with a covenant to renew for another like period is good, a similar policy ought to govern reversionary leases.

The view has recently been expressed that the New York Rule against Perpetuities is aimed not only at the suspension of the power of alienation but also at remoteness of vesting; see *Matter of Wilcox* (1909) 194 N. Y. 288, 87 N. E. 497; but under either Rule a lease *in futuro* would be valid in that state according to the view herein expressed.

¹⁸A concurrent lease may be given, which in effect amounts to a lease of the reversion itself and entitles the second lessee to the rents and profits during the period of his term. 2 Platt, *op. cit.* 57; *Benjamin v. Northwestern Fire & Marine Ins. Co.* (1912) 119 Minn. 27, 137 N. W. 183; *Pendergast v. Young* (1850) 21 N. H. 234. The lessee in such a case is in the position of an assignee of the reversion, and has a vested right *in presenti*. But he may not restrain since he has no common law reversion. *Cf. Lewis v. Baker* [1905] 1 Ch. 46.

mitted, however, that the decision might have been based upon another line of reasoning. It may be said that upon the execution of the lease, the lessee received an immediate vested right in the term, with all its incidents, but that the time of enjoyment was postponed; and in this way various problems that may arise are solved by entirely eliminating the intervening interest.¹⁹ Such an opinion might have been a bit of judicial legislation, but it is in a case of this sort that "judges do and must legislate". The development by the courts of the rights of a lessee in possession, a development largely unaided by statute,²⁰ would have justified this final step. And indeed the practical effect of the court's decision is much as though this step had actually been taken. The view suggested is also consistent with the growing commercial importance of a term for years, and is in harmony with the trend of statutory legislation which has been toward giving the tenant out of possession greater rights against third parties,²¹ at the time when his right to enter accrues. But even in the absence of such statutes or where similar statutes have been narrowly construed²² the lessee may nevertheless be given adequate protection on common law principles.²³

ADJUSTMENT OF RIGHTS UNDER WORKMEN'S COMPENSATION WHERE INJURY IS CAUSED BY THIRD PARTY.—Certain employees injured in the course of their employment are entitled to recovery under workmen's compensation acts. Where the injury is caused by the wrong

¹⁹The result of this would be that a limitation of a term at the end of a prior term or estate would be identical to a similar limitation of a freehold upon a prior gift or grant, *viz.*, a vested remainder.

²⁰3 Bl. Comm. *200 *et seq.* Fox v. Corbitt (1917) 137 Tenn. 466, 194 N. W. 88 (tenant in possession permitted to enjoin a nuisance).

²¹See Cooper v. Gordon (N. D. 1917) 164 N. W. 21; Burton v. Rohebeck (1883) 30 Minn. 393, 15 N. W. 678; Alexander v. Carew (1866) 95 Mass. 70; Webb v. Heyman (1891) 40 Ill. App. 335.

²²See Blatchford v. Cole (1858) 5 C. B. (N. S.) *514; Eells v. Morse (1913) 208 N. Y. 103, 101 N. E. 803; Chylowski v. Steinberg (1916) 193 Mich. 547, 160 N. W. 421; Long v. Noe (1892) 49 Mo. App. 19; McCauley v. Hazlewood (C. C. 1894) 59 Fed. 877.

²³See Huffman v. Starks (1869) 31 Ind. 474; Mattingly's Ex'r. v. Brents (1913) 155 Ky. 570, 159 S. W. 1157; Some courts have permitted the tenant out of possession to maintain an action of ejectment against a third party who is wrongfully in possession. See Johnston v. Corson Gold Mining Co. (C. C. 1907) 157 Fed. 145; Gardner v. Keteltas (N. Y. 1842) 3 Hill 330; U. S. Realty & Imp. Co. v. Roth (1908) 193 N. Y. 570, 86 N. E. 544. But others have held that *interesse termini* does not qualify the owner to bring ejectment. See Petroleum Co. v. Coal, Coke & Mfg. Co. (1890) 89 Tenn. 381, 18 S. W. 65; Sennett v. Bucher (Pa. 1832) 3 Pen. & W. 392; 1 Platt, *op. cit.* 23. In Gillard v. Cheshire Lines Committee (1884) 32 W. R. 943, the court recognized that *interesse termini* was a right *in rem* by permitting a lessee who had not yet entered upon the land to recover damages against the third party for injury to the demised premises. A lessee before entry ought not of course to be able to maintain trespass which depends upon actual possession, Harrison v. Blackburn (1864) 17 C. B. (N. S.) *678, nor an action for breach of a covenant for quiet enjoyment which is based on disturbance of possession. Wallis v. Hands [1893] 2 Ch. 75. He may, however, maintain an action in covenant against the lessor for not putting him in possession. Coe v. Clay (1829) 5 Bing. 440; but see Mechanics' & Traders' Fire Ins. Co. v. Scott (N. Y. 1859) 2 Hilt. 550.

of a third party the employee may also have an action against the tort-feasor. Most of the acts expressly provide that this cause of action, in case the injured employee elects to receive compensation, shall be transferred to the one furnishing such compensation.¹ However, no such provision is made in the acts of some states² and the courts are called upon to determine the rights of the parties by applying existing legal and equitable principles. Three questions then arise: does the recovery under one claim bar an action upon the other; if not, does the employer or state fund upon payment of compensation become entitled to any part of the cause of action against the third party; or may the latter show the compensation received in mitigation of damages.

It is well settled that a release of, or satisfaction from, one joint tort-feasor releases all.³ However, the liability to furnish compensation clearly does not arise from tort but is imposed by statute quite irrespective of the employer's fault.⁴ Consequently this rule does not apply where the liability of one party is in tort and that of the other is under a compensation act, and there would seem to be no other principle to cause the recovery under one claim to bar an action upon the other.⁵

The doctrine of subrogation is applied wherever one not a volunteer has paid a debt owed, or indemnified one for a wrong caused, by another.⁶ Thus an insurer against fire,⁷ maritime loss,⁸ or employers' liability⁹ who has indemnified the insured, or a carrier who has been forced to pay for goods lost in transit,¹⁰ will be subrogated to whatever rights the insured or owner has against a third party responsible for the loss. Where, however, the amount paid to

¹By some statutes the employer may retain the entire amount recovered from the tort-feasor. Laws New York, 1916, c. 622, § 29. By other statutes the amount in excess of the compensation furnished must be returned to the employee, Hurd's Rev. Stat. Ill., 1915-1916, c. 48, § 152b, or the recovery against the tort-feasor may only be to the extent of the compensation. Acts Kentucky, 1916, c. 33, § 9; 6 Edw. VII, c. 58, § 6.

²Arizona, New Hampshire, Ohio, Texas, West Virginia, and, before amendment in 1913, see *Newark Paving Co. v. Klotz* (1914) 85 N. J. L. 432, 91 Atl. 91, New Jersey. See Jones, Digest of Workmen's Compensation Laws.

³15 Columbia Law Rev. 641; *Aldrich v. Parnell* (1888) 147 Mass. 409, 18 N. E. 170.

⁴See articles by Ernst Angell, 13 Ohio Law Rep. 7, and Jeremiah Smith, 27 Harvard Law Rev. 235.

⁵See cases cited in footnotes 16 and 25, *infra*. The fact that the negligence of the employer contributed with that of the third party in causing the injury is immaterial, since the workmen's compensation acts in imposing a liability for compensation freed the employer from liability for torts. *Mercer v. Ott* (1916) 78 W. Va. 629, 89 S. E. 952.

⁶*Sheldon*, Subrogation (2nd ed.) § 3; see *Aetna Life Ins. Co. v. Midleport* (1887) 124 U. S. 534, 8 Sup. Ct. 625; *Warford v. Hankins* (1898) 150 Ind. 489, 50 N. E. 468.

⁷*Vance*, Insurance 422; *Connecticut Fire Ins. Co. v. Erie Ry.* (1878) 73 N. Y. 399.

⁸*Sheldon*, *op. cit.* § 221; *Liverpool Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 9 Sup. Ct. 469.

⁹*Travelers Ins. Co. v. Great Lakes Engineering Co.* (C. C. A. 1911) 184 Fed. 426.

¹⁰*Hutchinson*, Carriers (2nd ed.) § 427.

the injured party is not indemnity but a fixed sum payable upon the contingency of injury, as is generally held to be the case in life¹¹ and accident¹² insurance, subrogation is denied.¹³ It would seem that the principle which induces the courts to draw this distinction is sound, although its application to life and accident insurance has been questioned.¹⁴ One required to indemnify should not be compelled to do more than make the injured party whole, and this result is reached, where he is called upon to furnish indemnity, by subrogating him to whatever other rights the injured party may have acquired because of his injury. But where a sum is to be paid upon a contingency, determined in amount without regard to the damage actually suffered thereby, there would seem to be little reason for taking rights from the injured party in order to give them to one who has done no more than he was obligated to do. It would seem that workmen's compensation is not intended to be, and is not in fact, indemnity, for the amount received bears little relation to the amount necessary to reimburse the employee for his injury.¹⁵ It follows that the doctrine of subrogation, as it has been understood in the past, does not apply; accordingly the courts have not allowed the one who furnishes the compensation to be subrogated to the employee's rights against the third party.¹⁶ However, as a matter of legislative policy, it appears unwise to allow an injured party to receive workmen's compensation, besides complete indemnity from the tort-feasor, at the expense, directly of his employer, and indirectly of the consumer and his fellow employees.¹⁷

Granting that the employee retains the complete beneficial interest in his cause of action,¹⁸ may the tort-feasor introduce as evidence in

¹¹I Joyce, *Insurance* (2nd ed.) § 26; but see May, *Insurance* (3rd ed.) § 7.

¹²I Joyce, *op. cit.* § 27.

¹³*In life insurance.* See *Burnand v. Rodocanachi* (1882) 7 App. Cas. 333, 340-341; *cf.* *Insurance Co. v. Brame* (1877) 95 U. S. 754; but *cf.* *Connecticut Mutual Life Ins. Co. v. New York, etc., R. R.* (1856) 25 Conn. 265. There is an additional reason which prevents subrogation in life insurance. Originally all causes of action abated at the insured's death so that there was no cause of action to which to be subrogated. Later rights of action were given to personal representatives, or next of kin, which are said to be new and independent rights to which the insurer has no claim. *Vance, op. cit.* 428. *In accident insurance.* *Gatzweiler v. Milwaukee Electric, etc., Co.* (1908) 136 Wis. 34, 116 N. W. 633; *Aetna Life Ins. Co. v. Parker* (1902) 30 Tex. Civ. App. 521, 72 S. W. 621, *aff'd.* 96 Texas 287, 72 S. W. 168; *Suttles v. Railway Mail Ass'n.* (1913) 156 App. Div. 435, 141 N. Y. Supp. 1024.

¹⁴See May, *loc. cit.*

¹⁵See *Lewis and Clark County v. Industrial Accident Board* (Mont. 1916) 155 Pac. 268; *State v. Clausen* (1911) 65 Wash. 156, 117 Pac. 1101; *Jillson v. Ross* (R. I. 1915) 94 Atl. 717; *cf.* 12 Illinois Law Rev. 566.

¹⁶*Interstate Tel. & Tel. Co. v. Public Service, etc., Co.* (1914) 86 N. J. L. 26, 90 Atl. 1062; *Mercer v. Ott, supra*; *Newark Paving Co. v. Klotz, supra*; *Perlsburg v. Muller* (1912) 35 N. J. L. J. 299.

¹⁷*Bradbury, Workmen's Compensation* (3d ed.) 290. This is evidenced by the fact that the great majority of the states adopting workmen's compensation have provided for the subrogation of the employer or state fund. *Jones, op. cit.*

¹⁸If the employer or insurance fund were subrogated it is clear that the tort-feasor could not plead the amount received from them in mitiga-

mitigation of damages the amount received by the employee under a workmen's compensation act? It may be stated as a general rule that a tort-feasor may show in mitigation of damages such benefits to the plaintiff for which he himself is responsible, *i. e.*, of which his acts are the natural and probable cause.¹⁹ He may not, however, by the weight of authority, show that the plaintiff has received insurance,²⁰ or that benefits have been conferred upon him by third parties, such as wages gratuitously continued by an employer,²¹ medical services or nursing given without charge or paid for by others,²² but the plaintiff may recover the same amount as if the insurance or gratuities had not been received. The courts have applied the same rule where the benefits were conferred by statute or city ordinance at the expense of the community at large, justly considering the statute or ordinance and not the tort-feasor's wrongful act to be the true cause of the benefits.²³ Accordingly, in the recent case of *Brunk v. Cleveland, etc., Ry.* (Ohio 1918) 20 N. P. (N. S.) 360 it was held, in a suit by an injured employee, that compensation received under the Ohio Workmen's Compensation Act could not be introduced as evidence in mitigation of damages by the tort-feasor.²⁴

tion of damages in a suit by the employee as the necessary incidence of the receipt of the compensation would be the retention of the cause of action against the tort-feasor to hold for the benefit of the one paying the compensation.

¹⁹See *Wolf v. Studebaker* (1870) 65 Pa. 459.

²⁰*Bradburn v. Great Western Ry.* (1874) L. R. 10 Ex. 1; *Missouri, etc., Ry. v. Flood* (1904) 35 Tex. Civ. App. 197, 79 S. W. 1106.

²¹*Williams v. St. Louis, etc., Ry.* (1894) 123 Mo. 573, 27 S. W. 387; *Ohio, etc., Ry. v. Dickerson* (1877) 59 Ind. 317; *contra*, *Drinkwater v. Dinsmore* (1880) 80 N. Y. 390; *Montgomery, etc., Ry. v. Mallette* (1891) 92 Ala. 209, 9 So. 363; *Goodhardt v. Pennsylvania R. R.* (1896) 177 Pa. 1, 35 Atl. 191.

²²*Denver & Rio Grande R. R. v. Lorentzen* (C. C. A. 1897) 79 Fed. 291; *Klein v. Thompson* (1869) 19 Oh. St., 569; *Fort Worth, etc., Ry. v. Walker* (1907) 48 Tex. Civ. App. 86, 106 S. W. 400; *contra*, *Goodhardt v. Pennsylvania R. R.*, *supra*.

²³*Geary v. Metropolitan Street Ry.* (1902) 73 App. Div. 441, 77 N. Y. Supp. 54 (city fireman's pension); *St. Louis, etc., Ry. v. Maddry* (1893) 57 Ark. 306, 21 S. W. 472 (soldier's pension); *Illinois Central R. R. v. Porter* (1906) 117 Tenn. 13, 94 S. W. 666 (government mail clerk's salary continued during period of disability); *Nashville, etc., Ry. v. Miller* (1904) 120 Ga. 453, 47 S. E. 959 (same facts as in the preceding case). In *Kansas City v. McDonald* (1899) 60 Kan. 481, 57 Pac. 123 a statute provided for a tax on foreign insurance companies to furnish accident insurance for firemen. A fireman was injured by the city's negligence. *Held*, the amount received under the insurance policy could not be shown by the city in mitigation of damages. It would seem that the insurance received by the fireman in this case resembled very closely in its nature and source workmen's compensation.

²⁴*Accord*, *Merrill v. Marietta Torpedo Co.* (W. Va. 1917) 92 S. E. 112; *Jacowicz v. Delaware, etc., Ry.* (1915) 87 N. J. L. 273, 92 Atl. 946; *Bidinger v. Steininger-Taylor Co.* (Ohio 1915) 18 N. P. (N. S.) 42; *Kenning v. Railway & Terminal Co.* (Ohio 1915) 18 N. P. (N. S.) 526; see *Vayto v. Terminal & Railway Co.* (Ohio 1915) 18 N. P. (N. S.) 305. It is to be noted that these cases cannot be considered holdings for the denial of subrogation. At common law one insured against fire could always recover from the tort-feasor in a suit in his own name, although the insurer had been subrogated to his cause of action and would be equitably entitled to the

The result of the cases is, therefore, that the injured party may recover, in the absence of any express statutory provision to the contrary, full indemnity from the tort-feasor and also workmen's compensation. As before indicated, the result would seem to be undesirable but one not within the province of the courts to remedy.

proceeds. *Mobile, etc., Ry. v. Jurey* (1889) 111 U. S. 584, 4 Sup. Ct. 566. Under reformed codes stipulating that all actions shall be brought in the name of the real party in interest, if the insurance company has fully indemnified the insured the action against the tort-feasor must be in the company's name *Munson v. New York, etc., R. R.* (1900) 32 Misc. 282, 65 N. Y. Supp. 848. But where the insurance company has only partly indemnified the injured party, as had the employer or state fund in the cases cited above, the proper action is still by the injured party *Kansas City, etc., Ry. v. Shutt* (1909) 24 Okla. 96, 104 Pac. 51.

RECENT DECISIONS.

CARL M. BEREN, *Editor-in-Charge.*

GEORGE L. BULAND, *Associate Editor.*

ADMIRALTY—DEATH BY WRONGFUL ACT—ENFORCEMENT OF STATE STATUTES.—A Massachusetts schooner was run down and sunk by a British steamer on the high seas. The libellant, personal representative of one who met his death in the accident, brought suit for damages under the state statute allowing recovery for death by wrongful act. *Held*, the state statute was inapplicable to afford relief. *The Sagamore* (1 C. C. A. 1917) 247 Fed. 743.

Although there is no remedy in general maritime law for death by wrongful act, *The Harrisburg* (1886) 119 U. S. 199; 7 Sup. Ct. 140, admiralty courts have allowed a recovery by enforcing state statutes giving a right of action in such cases, *The Anglo-Patagonian* (C. C. A. 1916) 235 Fed. 92, even against foreign vessels while in state waters. *The Horsa* (D. C. 1915) 232 Fed. 993. However, since these state statutes can have no general extra-territorial effect, difficulties arise when the wrong occurs on the high seas. The courts have partially overcome these difficulties by employing the fiction that a vessel while on the high seas is a part of the territory of the state where it is owned and is therefore subject to the laws of the particular state. *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133; see *Internat'l Nav. Co. v. Lindstrom* (C. C. A. 1903) 123 Fed. 475. A logical application of this fiction would seem to necessitate a result contrary to that reached in the instant case, since the wrong was consummated on the Massachusetts vessel. Nevertheless, although the question has never been squarely presented, courts have stated that where the offending vessel is foreign a state statute is inapplicable to afford relief for death by wrongful act on the high seas. See *The Alaska* (1889) 130 U. S. 201, 9 Sup. Ct. 461; *Lindstrom v. Internat'l Nav. Co.* (C. C. 1902) 117 Fed. 170. The fiction of extended jurisdiction, then, at the present time is effective only to afford relief under a particular state statute when the offending vessel is owned in that state. This condition can only be remedied by the enactment of a federal statute giving a right of action in cases like the instant one. See 22 Case and Comment 125. However, in view of the present policy to apply the law of the jurisdiction where the foreign vessel is registered, *La Bourgogne* (1908) 210 U. S. 95, 28 Sup. Ct. 664; see 21 Harvard Law Rev. 1; 75, a recovery should have been allowed in the instant case by the application of the British law. See *Davidsson v. Hill* [1901] 2 K. B. 606.

ASSAULT AND BATTERY—ACCIDENT AND MISTAKE—VIOLATION OF SUNDAY LAW.—The plaintiff and the defendant went out to shoot gray squirrels in violation of a Sunday law. The defendant shot at the gray cap of the plaintiff, mistaking it for a squirrel, thereby injuring the plaintiff. *Held*, the plaintiff was entitled to recover in trespass. *White v. Levarn* (Vt. 1918) 102 Atl. 1035.

The distinction between "accident" and "mistake" is fairly well recognized in the law of torts. Whittier, "Mistake in the Law of Torts", 15 Harvard Law Rev. 335. The former term is applied to an

act the consequences of which were not intended by the defendant and could not reasonably have been foreseen and avoided, whereas the latter is used to denote an act the consequences of which were intended, but with an erroneous belief that some external circumstances existed which justified it. Salmond, Torts (4th ed.) § 3. It is generally held that one is not liable for accidents, *Morris v. Platt* (1864) 32 Conn. 75; *Stanley v. Powell* [1891] 1 Q. B. 86, but is responsible for his mistakes. *Bazely v. Clarkson* (1681) 3 Lev. *37; *Dexter v. Cole* (1858) 6 Wis. *319; *contra, Paxton v. Boyer* (1873) 67 Ill. 132. The act complained of in the principal case is apparently more of a mistake than an accident, so that the defendant would seem to be liable irrespective of any Sunday law; but if it be considered an accident, his liability is doubtful. A plaintiff may recover for a breach of statutory duty causing injury to him where the statute has been passed for his protection. *Willy v. Mulledy* (1879) 75 N. Y. 310, but not where the statute was enacted to prevent some other mischief, *Gorris v. Scott* (1874) 9 Exch. 125, unless the violation directly causes the injury. *Inhabitants of Hyde Park v. Gay* (1876) 120 Mass. 589. Where an act is committed which is a violation of a right of the plaintiff given him by law the defendant is liable for more remote consequences of that act, *Wyant v. Crouse* (1901) 127 Mich. 158, 86 N. W. 527, but where the injury to the plaintiff is in violation of a statute which gives the plaintiff no personal rights, it would seem that the normal rules of proximate cause should be applied, and that the violation of the statute should be considered only as a circumstance. See *Gross v. Miller* (1894) 93 Iowa, 72, 61 N. W. 385; *Hughes v. Atlanta Steel Co.* (1911) 136 Ga. 511, 71 S. E. 728. By parity of reasoning, the mere fact that the plaintiff was also engaged in a violation of the law should not prevent his recovery in absence of proof that his violation directly contributed to his own injury. *Gross v. Miller, supra*; *Hughes v. Atlanta Steel Co. supra*; *contra, McGrath v. Merwin* (1873) 112 Mass. 467, changed by Mass. Gen. Laws (1884) c. 37. To hold otherwise would be to impose an additional penalty for a violation of the statute not contemplated by the legislature, and would in effect make one who violated a Sunday law forfeit all right to protection from the wantonness of others. See *Gross v. Miller, supra*.

BANKRUPTCY—HUSBAND AND WIFE—ESTATES BY THE ENTIRETY—DISCHARGE OF LIEN.—The defendant secured a judgment against husband and wife jointly which became a lien on an estate held by them in the entirety. Within four months a petition in bankruptcy was filed against the husband. The trustee made no claim to the estate by the entirety, but the defendant submitted his claim and received his share as a general creditor. The defendant now wishes to exercise his lien on the estate. In a suit to enjoin the sale, *held*, that under § 67f of the Federal Bankruptcy Act (30 Stat. 565, U. S. Comp. Stat. 1916, § 9651) the filing of the petition within four months and the subsequent adjudication of bankruptcy vacated the judgment lien as to the husband and therefore the estate could not be sold to satisfy it. *Ades v. Kaplan* (Md. 1918) 103 Atl. 94.

The discharge of the husband does not affect the liability of the wife where she is the co-debtor of her bankrupt husband, *Love v. McGill* (1906) 41 Tex. Civ. App. 471, 91 S. W. 246; *Security Savings Bank v. Scott* (1906) 3 Cal. App. 687, but a creditor of one spouse

cannot generally satisfy his claim out of an estate held by the entirety. 18 Columbia Law Rev. 605, *infra*. If, then, the lien was discharged as against the husband under § 67f, the instant case would seem sound in holding that the estate is no longer subject thereto. It should be borne in mind, however, that a trustee in bankruptcy acquires no greater rights than a creditor and therefore he acquires no interest in an estate by the entirety under the prevailing view; if he acquires a contingent title it is defeasible and worthless, *ibid*, *supra*, and he has an option to accept it or not. *Matter of Cogley* (D. C. 1901) 107 Fed. 73. If a lien on an estate by the entirety is created four months before the filing of the petition, it remains valid after the husband receives his personal discharge. *Frey v. McGaw* (1915) 127 Md. 23, 95 Atl. 960. In *Humberd v. Collings* (1898) 20 Ind. App. 93, 50 N. E. 14, it was held that a tax lien on property held by the entirety, having been declared void as to the husband, was also void as to the wife, but that case turned on the fact that the judgment was *in rem* and not in *personam*. In cases like the instant one, it is submitted that the four months period has no application, for if no title ever passed to the trustee, the lien is not divested, *Miller v. Barto* (1910) 247 Ill. 104, 93 N. E. 140; but *cf. Chicago, etc., R. R. v. Hall* (1913) 229 U. S. 511, 33 Sup. Ct. 885, and if he exercised his option to reject a worthless title, the lien still remained on the property as regards the bankrupt. *Rochester Lumber Co. v. Locke* (1903) 72 N. H. 22, 54 Atl. 705; *McCarty v. Light* (1913) 155 App. Div. 36, 139 N. Y. Supp. 853; but see *contra*, *People's Nat. Bank v. Maxon* (1915) 168 Iowa 318, 150 N. W. 601. The purpose of striking down the lien is to avoid an unfair preference as among creditors and therefore it is only struck down in favor of the trustee and his grantees, but not in favor of third persons. *New Orleans, etc., Co. v. Grisson* (1902) 79 Miss. 662, 31 So. 336. *Hutchins v. Cantu* (Tex. Civ. App. 1902) 66 S. W. 138. These considerations were not raised by the court in the principal case, but they appear to be controlling and therefore the decision seems unsound.

BANKRUPTCY—HUSBAND AND WIFE—ESTATES BY THE ENTIRETY—TITLE OF TRUSTEE.—A trustee in bankruptcy brought proceedings to recover certain property alleged to belong to the estate of the bankrupt husband. The property consisted of a contract whereby the husband and wife were to purchase land as tenants by the entirety. *Held*, this interest constituted an estate by the entirety and did not pass to the trustee of the husband. *In re Berry* (D. C. E. D. Mich. 1917) 247 Fed. 700.

Under § 70a (5) of the Bankruptcy Act (30 Stat. 565, Comp. Stat. 1916, § 9654) the trustee is vested with the title of the bankrupt to all property which the bankrupt might have transferred or which might have been levied upon and sold on execution. What property falls within this clause is to be determined by the law of the state in which it is located. *In re Butterwick* (D. C. 1904) 131 Fed. 371. In the case of estates by the entirety it is generally held that they are not subject to execution under the Married Women's Acts for the debts of either spouse, *Stifel's, etc., Co. v. Saxy* (Mo. 1918) 201 S. W. 67; *Hood v. Mercer* (1909) 150 N. C. 699, 64 S. E. 897, but jurisdictions vary in this respect, *Hiles v. Fisher* (1895) 144 N. Y. 306, 39 N. E. 337, and hence the rights of the assignee in insolvency vary accordingly. *Laird v. Perry* (1902) 74 Vt. 454, 52 Atl. 1040. A favorite view is that a contingent lien is created which will become effective

if the debtor survives the other spouse. *In re Meyer's Estate* (1911) 232 Pa. 89, 81 Atl. 145. An interesting question is presented whether a conveyance by the husband and wife can defeat such a lien. It is generally held that it can, *Jordan v. Reynolds* (1907) 105 Md. 288, 66 Atl. 37; *Beihl v. Martin* (1912) 236 Pa. 519, 84 Atl. 953, and a trustee in bankruptcy is not entitled to an order restraining the conveyance. *In re Beihl* (D. C. 1912) 197 Fed. 870. Yet in *Servis v. Dorn* (1909) 76 N. J. Eq. 241, 76 Atl. 246, the court refused to hand over to the mortgagors of an estate by the entirety the surplus arising from the foreclosure sale on the ground that the creditors of the husband had a lien on the fund which would become effective if he survived his wife. It would seem, however, that, if they had a right to convey the land and thus defeat a possible realization by his creditors, they would be entitled to the fund and be equally free to defeat any contingent lien attaching to it. Practically, in most jurisdictions if the creditors acquire nothing more than a contingent lien, the trustee in bankruptcy acquires nothing of value. The instant case seems to be in accordance with the general view.

BILLS AND NOTES—AUTHORITY TO FILL IN BLANKS—ALTERATION.—The defendants, to accommodate the maker, signed an order note as indorsers, leaving blank the space for the name of the payee, and handed the instrument to the maker. The maker, proposing to sell the instrument to X, inserted his name as payee. X, however, refused to purchase the note. Thereafter, the plaintiff bank, with the consent of the maker, inserted after X's name the words "or bearer" and discounted the note. *Held*, in an action against the indorsers, that they were discharged since the insertion was beyond the authority granted. *First Nat'l Bank of Hartsville v. Wood* (S. C. 1918) 95 S. E. 140.

It is well settled that the substitution of "or bearer" for "or order" is a material alteration of an instrument, *Marshall v. Wilhite Church* (1889) 4 Ohio C. C. 203; see *Builders' Lime & Cement Co. v. Weimer* (1915) 170 Iowa 444, 151 N. W. 100, because the mode of transfer is thereby affected, *McCauley v. Gordon* (1879) 64 Ga. 221. However, there is some authority to the contrary based on the proposition that such an alteration does not prejudice the obligor. *McLaughlin v. Venine* (1870) 2 Wyo. 1. The latter view seems incorrect because the law, to prevent tampering with negotiable instruments, *cf. McCauley v. Gordon, supra*, considers material any alteration that affects the identity of the obligation evidenced by the writing, regardless of detriment or benefit to the obligor. *Barton Savings Bank & Trust Co. v. Stephenson* (1914) 87 Vt. 433, 89 Atl. 639; *Commonwealth Nat'l Bank v. Baughman* (1910) 27 Okla. 175, 111 Pac. 332. Since an instrument "to the order of X or bearer" may be negotiated by delivery, *Bitzer v. Wagar* (1890) 83 Mich. 223, 47 N. W. 210; *Bate v. Heywood* (So. Afr. 1882) 2 E. D. 153, the court's view that the unauthorized addition of the words "or bearer" to an order instrument is a material alteration is correct. *Croswell v. Labree* (1888) 81 Me. 44, 16 Atl. 331; see *Builders' Lime & Cement Co. v. Weimer, supra*; *contra, Weaver v. Bromley* (1887) 65 Mich. 212, 31 N. W. 839. But it is difficult to justify the application of that doctrine to the principal case, for there it appears that the insertion of those words was simply an authorized filling in of the blank. Where an instrument containing blanks is entrusted to a party for his accom-

modation, in the absence of other facts, he is not only authorized to fill in the blanks so as to make the instrument available for the purpose for which it was entrusted, but has the additional right, inasmuch as the filling in is of no effect until delivery, to change what he has already inserted so that the instrument may conform to that purpose. *Douglass v. Scott & Fry* (1837) 35 Va. 43. In the principal case the insertion of the words "or bearer" was certainly made in order to secure the sale of the note, which was the purpose contemplated by the defendants. The fact that the instrument contained the words "or order" can hardly be considered inconsistent with an authority to make the instrument payable to bearer, *cf.* Neg. Inst. Law § 9 (3), and the circumstances, on the whole, seem to justify the inference that the maker was actually authorized to complete the note as he did.

CONSTITUTIONAL LAW—APPROPRIATIONS TO SECTARIAN SCHOOLS.—The plaintiffs brought a bill to enjoin the payment of county funds to certain Catholic institutions for the maintenance of dependent children committed thereto by statutory provision. Children of various faiths were sent to these institutions. The Catholic catechism was taught to all, but only Catholic children were required to attend the Catholic chapel. *Held*, since the proposed payment was less than the actual cost of maintaining the children, it would not be a violation of a constitutional prohibition against payments of public funds "in aid of any church or sectarian purpose". *Trost v. Ketteler Manual Training School* (Ill. 1918) 118 N. E. 743.

Most state constitutions provide in substance that no public funds shall be appropriated in aid of any sectarian purpose or institution. Ill. Constitution, Art. VIII, § 3; Mont. Constitution, Art. V, § 35; Index Dig. of State Constitutions Prepared for the N. Y. State Constitutional Convention Commission (1915) 585-6, 1253-5. As a general rule, sectarian instruction or exercises in a public school will make it sectarian within the meaning of such provisions. *State ex rel. Weiss v. District Board* (1890) 76 Wis. 177, 44 N. W. 967; *Hysong v. Gallitzin Borough* (1894) 164 Pa. 652, 30 Atl. 480. As to what constitutes sectarian instruction there is a diversity of opinion. By the great weight of authority, reading the Bible in a public school without comment is not sectarian instruction. *Stevenson v. Hanyon* (1898) 7 Pa. Distr. R. 585; *Church v. Bullock* (Tex. Sup. Ct. 1908) 109 S. W. 115; *contra*, *State ex rel. Weiss v. District Board*, *supra*; *People ex rel. Ring v. Board of Education* (1910) 245 Ill. 334, 92 N. E. 251. On the same principle, appropriations of public funds for the support of privately managed reform or industrial schools or orphan asylums in which sectarian instruction is given have been held invalid. *County of Cook v. Chicago Industrial School* (1888) 125 Ill. 540, 18 N. E. 183; *State ex rel. Nevada Orphan Asylum v. Hallock* (1882) 16 Nev. 373. In the instant case, the question arises whether an appropriation of less than the actual cost of maintaining the inmates constitutes "aid" or support within the meaning of the constitutional prohibition. It has been held that any appropriation, regardless of the amount or the rendition of services therefor, is an "aid" to such a school. *County of Cook v. Chicago Industrial School*, *supra*; *State ex rel. Nevada Orphan Asylum v. Hallock*, *supra*, and a literal interpretation would seem to sustain such a result. But the Illinois courts, influenced doubtless by the fact that these institutions are performing a duty which the state would otherwise have to perform at a greater

expense, have held that appropriations to such schools of less than the actual cost of maintaining the children are not prohibited even though the school is controlled by a church, *Dunn v. Addison Manual Training School* (1907) 281 Ill. 352, 117 N. E. 993, and sectarian instruction is given therein. *Dunn v. Chicago Industrial School* (1917) 280 Ill. 613, 117 N. E. 735.

CONSTITUTIONAL LAW—INVALID CLAIMS AGAINST COUNTIES—CURATIVE LEGISLATION.—A Pennsylvania statute provided that whenever any county had heretofore entered into a contract for the construction of a public highway, bridge, or tunnel, and was unable to pay for the work done because of the unconstitutionality of the legislative act purporting to authorize it, the court should be valid and binding upon the county, to the extent to which such work had been completed prior to the date on which the act was declared unconstitutional. The statute was attacked as authorizing a loan or donation of the country's money to a corporation or individual, and as a legislative assumption of judicial powers. *Held*, it was constitutional. *Kennedy v. Meyer* (Pa. 1918) 103 Atl. 44.

It is well settled that, when a county or municipality has received benefits under a contract unenforceable against it because made in excess of its authority or in non-compliance with the provisions of a controlling statute, the legislature, if it could originally have authorized the transaction, may by curative legislation validate the claim arising therefrom. *Mayor v. Tenth Nat'l Bank* (1888) 111 N. Y. 446, 18 N. E. 618; 4 McQuillin, Mun. Corp. § 1894. Such legislation is not an invasion of the judicial prerogative for it concedes the unenforceability of the obligation declared invalid by the courts, as contracted without legislative authorization, and merely supplies the sanction necessary to validate it. *Steele County v. Erskine* (C. C. A. 1899) 98 Fed. 215. It does not contemplate a gratuitous disposition of the public funds, and hence is not violative of a constitutional provision prohibiting the legislature from authorizing the gift or loan of money by a county to an individual or corporation. The satisfaction of the moral obligation resting upon the county or municipality because of the benefit it has received under the contract cannot be called a gratuity, for that would presuppose the absence of any claim, legal or moral. *Steele County v. Erskine, supra*; *contra, Conlin v. Board of Supervisors* (1893) 99 Cal. 17, 33 Pac. 753. The curative act need not correct the errors of the prior act, *New Orleans v. Clark* (1877) 95 U. S. 644; see *Marion Water Co. v. City of Marion* (1903) 121 Iowa 306, 96 N. W. 883, nor need the other party to the contract proceed further to perform under a new and valid authorization. *Wrought-Iron Bridge Co. v. Town of Attica* (1890) 119 N. Y. 204, 23 N. E. 542. The principal case is distinguishable from those cited in that the original claim was unenforceable, not because it was *ultra vires* on the part of the county, but because the statute purporting to authorize it was unconstitutional, its title having failed to express the legislative purpose. The principle involved is, however, identical: if the legislature had power originally to authorize the transaction out of which the claim arose, its ratification is sufficient to render enforceable an obligation that was imperfect only because incurred without such sanction. *Cf. Donley v. City of Pittsburgh* (1892) 147 Pa. 348, 23 Atl. 394.

CONSTITUTIONAL LAW—MECHANIC'S LIEN—EQUAL PROTECTION OF LAWS—STATUTE ALLOWING ATTORNEY'S FEES.—The appellant attacks the constitutionality of a statute which provides that the plaintiff in a suit to enforce a mechanic's or materialman's lien, if successful, shall recover a reasonable attorney's fee not to exceed 10% of the amount of the judgment, regardless of whether he recovers the entire amount sued for. Fla. Comp. L. Ann. § 2218. *Held*, the statute was unconstitutional since it denied to the defendant in such suits the equal protection of the laws. *Union Terminal v. Turner Construction Co.* (5 C. C. A. 1918) 247 Fed. 727.

It is well established that the legislature may legislate as to classes under proper circumstances. Such classification, however, cannot be arbitrary, but must be based upon some reasonable distinction. *Braceville Coal Co. v. The People* (1893) 147 Ill. 66, 35 N. E. 62; *Gulf, Ry. v. Ellis* (1896) 165 U. S. 150, 17 Sup. Ct. 255. Under this power statutes for assessing double damages or attorney's fees upon the defendant in favor of the plaintiff, when successful, have been sustained in various cases; such as in actions for damages to live stock caused by the failure of the defendant railroad to fence its tracks as required by law, *Kansas Pac. Ry. v. Mower* (1876) 16 Kan. 573; *Missouri Pac. Ry. v. Humes* (1885) 115 U. S. 512, 6 Sup. Ct. 110; *Railroads v. Crider* (1892) 91 Tenn. 489, 19 S. W. 618, or in suits against a railroad company for damages from fire caused by its locomotive, *Atchison, etc., R. R. v. Matthews* (1898) 174 U. S. 96, 19 Sup. Ct. 609, or in suits against common carriers for overcharges. *Dow v. Beidelmen* (1887) 49 Ark. 455; *Burlington, etc., R. R. v. Dey* (1891) 82 Iowa 312, 48 N. W. 98. The ground upon which these statutes are sustained is that it is a reasonable use of the police power to impose a penalty for such wrongful acts. See *Peoria, etc., Ry. v. Duggan* (1884) 109 Ill. 537. But in cases where statutes impose attorney's fees upon the defendant in favor of the plaintiff in an action to enforce a mechanic's or a materialman's lien there is a division of authority as to the constitutionality of such statutes. If the statutes provide that the plaintiff is entitled to attorney's fees, only if he recovers the full amount sued for, *Vogel v. Pekoc* (1895) 157 Ill. 339, 42 N. E. 386; *contra*, *Hocking Valley Coal Co. v. Rosser* (1895) 53 Oh. St. 12, 41 N. E. 263, or if the defendant acted in bad faith in his refusal to settle, *Williamson v. Liverpool, etc., Ins. Co.* (1905) 141 Fed. 54, they have been held constitutional. But if the statutes impose attorney's fees upon the defendant even though the plaintiff fails to recover the full amount sued for and regardless of the defendant's good or bad faith, some courts have refused to sustain them, *Davidson v. Jennings* (1900) 27 Colo. 187, 60 Pac. 354; *Atkinson v. Woodmansee* (1903) 68 Kan. 71, 74 Pac. 640; *contra*, *Dell v. Marvin* (1899) 41 Fla. 221, 26 So. 188, on the ground that they impose a penalty upon the defendant even though he acted with reasonable cause in refusing to pay more than the plaintiff was entitled to recover. See *Hocking Valley Coal Co. v. Rosser*, *supra*. It would seem that this reasoning is sound and that, therefore, the decision in the principal case is correct.

ELECTIONS—VACANCY IN CONGRESS—REAPPORTIONMENT.—In 1916 one Fitzgerald was elected to the Sixty-fifth Congress from the Seventh New York District. In 1917 the legislature of New York changed the boundaries of districts from the third to the tenth, inclusive, so that

part of the territory formerly in the seventh was placed in another district and some territory not previously in the seventh was added to it. In 1918 Fitzgerald resigned and the governor called an election in the seventh district to fill the vacancy. *Held*, two judges dissenting, that the election must be held in the district as changed and not in the district as it existed at the time of the election of Fitzgerald. *People ex rel. Fitzgerald v. Voorhis* (1918) 222 N. Y. 494.

Under the Constitution of the United States (Art. 1, § 4) Congress may make regulations as to the manner of choosing representatives in Congress, and it has provided that they shall be elected in each state by districts equal in number to the number of representatives allotted to the state, and that no district shall elect more than one representative. 37 Stat. 13; see *Ex parte Yarbrough* (1884) 110 U. S. 651, 660, 4 Sup. Ct. 152. To allow an election in the district as changed would conflict with this provision, since not only would the residents in the territory newly annexed to the district be allowed to participate in the election of two representatives, *Hunt v. Menard* (House of Reps. 1869) McCrary, Elections (4th ed.) § 190, 1 Hinds, Precedents of the House of Representatives § 327d, but the people in the territory cut off from the seventh would be denied representation. *Hunt v. Menard*, *supra*; cf. *Warren v. Mayor of Charleston* (1854) 68 Mass. 84, 105. It is difficult, moreover, to see how a vacancy in the Sixty-fifth Congress could exist in a district which, like the district as changed, did not exist when that Congress was chosen. The court considered that there could be no election in the old district on the ground that the legislature had put an end to its existence. But since the legislature could not abridge the terms of the representatives chosen in 1916 for two years and thus the reapportionment could not become effective, under normal conditions, during the life of the Sixty-fifth Congress, Mechem, Public Officers, § 467; cf. *Lowe v. Commonwealth* (1861) 60 Ky. 237, it would seem that the reapportionment was not intended to affect the representation in the Sixty-fifth Congress, but was intended to deal solely with elections to subsequent Congresses, and therefore that the legislative intention was to preserve the existing districts until the termination of the life of the Sixty-fifth Congress. Moreover, since the reapportionment comprehended an extensive scheme of redistricting, it would seem that the legislature intended that the provision for the creation of the new seventh district should become effective only when the provisions for the creation of the other new districts took effect, cf. *Matter of Dowling* (1916) 219 N. Y. 44, 59, 113 N. E. 545, and that until all the provisions of the reapportionment took effect, the old district should continue its existence. Cf. *Matter of Dowling*, *supra*.

EQUITY—EFFECT OF JURY VERDICT IN EQUITABLE ACTION.—In a bill to enjoin trespass and recover damages, the chancellor sent the parties to law to try the title. *Held*, that the finding of the jury was not merely advisory upon the chancellor but controlling, and would be set aside only if flagrantly opposed to the evidence. *Fort v. Wiser* (Ky. 1918) 201 S. W. 7.

The equity court has inherent power to decide any question of law or fact in any case over which it has jurisdiction. Shipman, Equity Pleading § 63. The chancellor may in his discretion, however, either submit issues of fact to a jury, or may send the parties to the law

court to adjudicate their legal rights. See *American Dock & Improvement Co. v. Trustees for Public Schools* (1883) 37 N. J. Eq. 266; *Shipman, loc. cit.* In the former event the findings are purely advisory, and the chancellor is free to disregard them. *Kohn v. McNulta* (1893) 147 U. S. 238, 13 Sup. Ct. 298. If he rejects them as against the weight of the evidence, he is not constrained to award a new trial, as he would be in a law action, but may proceed to give final judgment. *Garrett v. Stevenson* (1846) 8 Ill. 261, 278. But where the chancellor sends the parties to law to adjudicate their legal rights, the verdict of the law court is controlling. See *American Dock & Improvement Co. v. Trustees for Public Schools, supra.* In the absence of statute, neither party has an absolute right to have issues of fact in an equity action submitted to a jury. *Selfridge v. Leonard-Heffner Co.* (1911) 51 Colo. 314, 117 Pac. 158, and this despite the fact that legal as well as equitable relief is sought. *Lynch v. Metropolitan Elev. Ry.* (N. Y. 1891) 28 Abb. N. C. 1; *Neff v. Barber* (Wis. 1917) 162 N. W. 667; but see *Morton Brick & Tile Co. v. Sodergren* (1915) 130 Minn. 252, 153 N. W. 527. Legislation has in some respects altered this orthodox procedure. Statutes are now found which give an absolute right to have certain issues of fact arising in an equity action passed upon by a jury. *Winchester v. Watson* (1916) 169 Ky. 213, 183 S. W. 483; *Brown v. Greer* (1914) 16 Ariz. 215, 141 Pac. 841. In such cases it seems that the verdict of a jury is entitled to as much weight as is given any other jury verdict, and that consequently the finding so made is controlling, and not merely advisory. *Winchester v. Watson, supra*; *Morawick v. Martineck's Guardian* (1908) 128 Ky. 155, 107 S. W. 759. Even under such statutes, where the chancellor in his discretion submits an issue to the jury which is not demandable as a matter of right, the verdict is still only advisory. See *Morawick v. Martineck's Guardian, supra.* The decision in the principal case would probably have been the same independently of statute, since it seems that the parties had been sent to law to adjudicate their legal rights, but the existence of a statute in this jurisdiction giving the right of jury trial in equitable actions involving legal issues makes the result undoubtedly correct.

INTERNATIONAL LAW—SOVEREIGNTY—EXEMPTION FROM JUDICIAL REVIEW.—A Mexican military commander of the Carranza government, since recognized as the *de jure* government of Mexico by the United States, seized and sold property of a Mexican citizen as a military contribution. The property was brought to the United States by the purchaser. In an action of replevin by the assignee of the former owner, *held*, the validity of the sale was not subject to review in the United States courts. *Oetjen v. Central Leather Co.* (1918) 38 Sup. Ct. 309.

It is a well settled principle of international law that the government of a sovereign state has supreme authority over all acts committed within its territory, and the decisions of its courts are not subject to judicial review in any other state. Satisfaction can be obtained by another country only through diplomatic channels. *Underhill v. Hernandez* (1897) 168 U. S. 250, 18 Sup. Ct. 83. What is the *de jure* government of a country is a strictly political and not a judicial question, *Pearcy v. Stranahan* (1907) 205 U. S. 257, 27 Sup. Ct. 545, and the determination of this question by the executive

and legislative departments of the recognizing country gives the courts of the latter judicial notice of the recognition. See *Jones v. United States* (1890) 137 U. S. 202, 11 Sup. Ct. 80. The recognition, once obtained, is retroactive, and treats all the acts of the government since its establishment as acts of a sovereign state. See *Underhill v. Hernandez*, *supra*. But it seems very doubtful whether the recognition of a government as *de jure* is necessary to make its political acts immune from review in the courts of another state. Thus, the recognition that a civil war exists in a foreign state will prevent judicial review of captures of property made by the revolutionary party, even if the revolution subsequently fails. *The Divina Pastora* (1819) 17 U. S. 52. The reasoning of the lower court in *Underhill v. Hernandez* (C. C. A. 1895) 65 Fed. 577, is in accord with these views. Nor will the administrative acts of a military occupant of a part of our country be examined by our courts after the occupant is subsequently driven out. *United States v. Rice* (1819) 17 U. S. 246. Even after the Civil War the United States courts, though never having recognized the Confederacy as a *de jure* government, refused to review military acts done under its authority. See *Ford v. Surget* (1878) 97 U. S. 594; *Baldy v. Hunter* (1898) 171 U. S. 388, 18 Sup. Ct. 890. The instant case seems to be correctly decided, but the doctrines relating to *de jure* recognition do not seem to be involved in the decision.

INTERSTATE COMMERCE—TELEGRAPH COMPANIES—CONTRACTS LIMITING LIABILITY.—The plaintiff entrusted to the defendant company an interstate message on a telegraph blank, on the back of which was a contract limiting liability for negligent transmission to an agreed amount, according to the classification of the message. Because of negligent transmission the plaintiff was damaged. *Held*, that despite the fact that the amendment of June 18, 1910 brought telegraph companies within the scope of the Interstate Commerce Act, the state law holding such a contract void must be applied. *Des Arc Oil Mill v. Western Union Tel. Co.* (Ark. 1918) 201 S. W. 273.

Before the Carmack Amendment of June 29, 1906 (34 Stat. 584), the failure of the federal government to regulate contracts of interstate shipment left in effect those state laws which made void such contracts limiting liability to declared valuations based on freight charges, although the rule in the federal courts was otherwise. *Pennsylvania R. R. v. Hughes* (1903) 191 U. S. 477, 24 Sup. Ct. 132. Following the amendment such contracts were held valid on the theory that the federal government had taken exclusive control, thus ousting state jurisdiction. *Adams Express Co. v. Croninger* (1913) 226 U. S. 491, 33 Sup. Ct. 148. Influenced by this result, many courts in construing the amendment of June 18, 1910 (36 Stat. 544, § 7)—which designates telegraph companies as common carriers, requires reasonable rates, and permits classification of messages—have reached the same conclusion with reference to contracts like that in the principal case. *Williams & Sons v. Postal, etc., Tel. Co.* (Va. 1918) 95 S. E. 436; *Meadows v. Postal, etc., Tel. Co.* (1917) 173 N. C. 240, 91 S. E. 1009; *Cultra v. Western Union Tel. Co.* (1917) 44 I. C. C. R. 670; *contra*, *Western Union Tel. Co. v. Piper* (Tex. Civ. App. 1917) 191 S. W. 817; *Dickerson v. Western Union Tel. Co.* (1917) 114 Miss. 115, 74 So. 779. It is submitted, however, that the 1910 amendment made no attempt to regulate the contract of interstate transmission,

but merely conferred an initial federal jurisdiction over telegraph companies as common carriers. It follows, therefore, unless the Carmack Amendment is to be applied to telegraph companies, that their contracts limiting liability must be governed by the same principles as those applied to common carriers of goods before the amendment. *Pennsylvania R. R. v. Hughes*, *supra*. The Carmack Amendment, however, applies only to tangible "property received for transportation," and telegraph messages do not fall within this definition. See *Cultra v. Western Union Tel. Co.*, *supra*; *Primrose v. Western Union Tel. Co.* (1894) 154 U. S. 1, 14, 14 Sup. Ct. 1098. Nor is a telegraph message, in the light of the Carmack Amendment, susceptible of the valuation required of property delivered to a carrier for transportation. *Tredway v. Western Union Tel. Co.* (1916) 133 Minn. 252, 158 N. W. 247; see *Primrose v. Western Union Tel. Co.*, *supra*. It would seem, therefore, that the instant case is sound in applying the principle of *Pennsylvania R. R. v. Hughes*, *supra*, although opposed to the weight of authority. This conclusion seems strengthened by the fact that one jurisdiction already has abandoned the majority view, *Dickerson v. Western Union Tel. Co.*, *supra*, while another has expressed its disapproval of it, though yielding to precedent. *Western Union Tel. Co. v. Smith* (Ala. 1917) 75 So. 393.

LANDLORD AND TENANT—OPTION TO PURCHASE—ABROGATION.—A was the tenant of B under a lease containing an option to purchase at any time within the term for \$7000. Just before the term ended they contracted for the sale of the premises for the same price, payable in installments. This agreement was rescinded and A continued to pay rent to B. After A's death, and within the term, the plaintiff, his executrix, who had continued to pay the rent, sought to enforce the option. *Held*, the contract of sale and its rescission did not abrogate the option in the lease. *Thommen v. Smith* (N. J. Eq. 1918) 103 Atl. 25.

The courts have held uniformly that an option to purchase is an integral part of the lease in which it is contained. *Tibeau v. Ridge* (1914) 261 Mo. 547, 170 S. W. 871; *Amiss v. Whitting's Executor* (1908) 121 La. 502, 46 So. 606, and is, therefore, supported by the same consideration as the lease. *Murphy v. Anderson* (1914) 128 Minn. 106, 150 N. W. 387; *Tibeau v. Ridge*, *supra*. Consequently the exercise of the option ends the relation of landlord and tenant and creates that of vendor and vendee. *Master v. Roberts* (1914) 244 Pa. 342, 90 Atl. 735. In the principal case the payment of rent by the plaintiff and her intestate, following the rescission of the contract of sale, indicated, in the opinion of the court, that the transaction was never intended as an exercise of the option. It would seem, however, that the court might have inferred, from the fact that the transaction took place so near the end of the term, that the plaintiff's intestate meant to exercise his right to purchase under the lease, and that the subsequent rent payments, following the rescission, were by virtue of a tenancy at will, and not under the lease. The court, in the instant case, also relied on the argument that an option must be exercised within its terms, asserting that where the price is fixed it must be tendered in cash, and not under a credit plan. See *Amiss v. Whitting's Executor*, *supra*. Although admitting that an option, once waived, or abandoned, is lost and cannot be given effect by a subsequent tender of the purchase price, *Baxter v. De Kay* (1916) 93 Misc. 203,

157 N. Y. Supp. 156, the court has followed the general tendency to preserve options contained in leases; such options having been deemed to remain effective where the optionee offers a lower price than that named in the contract, *Baxter v. Calhoun* (D. C. 1915) 222 Fed. 111, or where, during the term, he contracts to take a new lease without an option, to become effective when the term expires. *Mathewson v. Burns* (1914) 50 Can. Sup. Ct. 115.

MARITIME LIENS—MASTER'S AUTHORITY TO CREATE.—A charter-party provided that the charterer should pay all expenses arising in connection with the use of the ship, and indemnify the owner as to liens and other claims against it. A materialman furnished supplies on the order of the master and expressly on the credit of the vessel, although he had been notified by the owner that neither charterer nor master had power to pledge the credit of the ship. *Held*, he was entitled to a lien. *The South Coast* (9 C. C. A. 1917) 247 Fed. 84.

The Act of June 23, 1910 (36 Stat. 604, c. 373, § 1, § 2) gives a maritime lien to materialmen rendering services or furnishing supplies to domestic or foreign ships on the order of the owner or his authorized agent, and creates a presumption of authority in the master to procure repairs and supplies for the vessel. § 3 expressly refuses a lien in favor of materialmen who know, or are chargeable with notice, that because of the terms of a charter-party, or for any other reason, the person ordering supplies is without authority to bind the vessel. In giving the master presumptive authority to pledge the credit of the ship, the statute did not modify the preexisting law. See *The Yankee* (C. C. A. 1916) 233 Fed. 919. Where, as in the instant case, the charter-party provides that the charterer shall make all disbursements and save the owner harmless from liens on the ship, some courts have held that the power of the master to confer a lien is removed, with respect to persons who had notice of the charter-party. *The Underwriter* (D. C. 1902) 119 Fed. 713; *The Francis J. O'Hara, Jr.* (D. C. 1915) 229 Fed. 312. Other courts apparently construe the agreement as only imposing on the charterer the obligation to indemnify the owner for any expenses the latter may be called on to pay, and allow a materialman, who had furnished supplies with full knowledge of the terms of the agreement, to assert a lien, *The Surprise* (C. C. A. 1904) 129 Fed. 873; *cf. The Monsoon* (C. C. 1842) 17 Fed. Cas. No. 9,716; *The City of New York* (D. C. 1854) 5 Fed. Cas. No. 2,758, unless, perhaps, in circumstances of distress. See *The William Cook* (D. C. 1882) 12 Fed. 919. It would seem clear, however, that if the charter-party expressly stipulates that neither charterer nor master has authority to bind the ship, a materialman knowing, or chargeable with notice, of the agreement, could not assert a lien. *The Eureka* (D. C. 1913) 209 Fed. 373. Similarly, where the materialman is notified in any other manner of an absence of authority in the master to pledge the vessel's credit, the presumption is overcome, and no lien in his favor is attached. *The William Cook, supra*; *The Schooner Columbus* (D. C. 1879) 5 Sawyer 487. The principal case, in allowing a lien under such circumstances, disregarded the trend of prior adjudication and the clear provision of the statute.

MORTGAGES—RIGHT OF A SUBSEQUENT MORTGAGEE TO THE APPOINTMENT OF A RECEIVER.—The plaintiff, a fourth mortgagee, filed a bill to foreclose his mortgage and requested the appointment of a receiver

of the rents and profits pending foreclosure. No notice of this action was given to the prior mortgagees. A receiver was appointed who, subsequent to the foreclosure of prior mortgages, filed a bill to account. In an action to determine the disposition of the fund collected by the receiver, *held*, that the fund belonged to the plaintiff. *Sullivan v. Rosson* (N. Y. Ct. of App. 1918) 9 Daily Record, No. 93.

Since a mortgagor in possession is entitled to rents and profits until entry by the mortgagee, the latter has no inherent right to the benefit of such rents even after default. *Teal v. Walker* (1884) 111 U. S. 242, 4 Sup. Ct. 420. The appointment of a receiver for the benefit of a mortgagee after default would seem to amount to a compulsory assignment of the rents and profits in aid of the security. See 12 Columbia Law Rev. 82. The right, therefore, to the appointment of a receiver after default in the conditions of the mortgage depends, in all jurisdictions, upon the equitable consideration that the retention of possession by the mortgagor would be detrimental to the mortgage security. *Land Title & Trust Co. v. Kellogg* (1907) 73 N. J. Eq. 524, 68 Atl. 80; see *New York Bldg. Loan Banking Co. v. Begly* (1902) 75 App. Div. 308, 78 N. Y. Supp. 169. The basis for this relief is the apparent inability of the mortgagor to redeem and the insufficiency of the security, or acts impairing the secured property. *Land Title & Trust Co. v. Kellogg*, *supra*; 3 Jones, Mortgages (7th ed.) § 1516. However, in a jurisdiction where the first mortgagee has the legal title, the courts of equity are loath to grant this extraordinary relief, since the mortgagee has his remedy at law by ejectment. Jones, *op. cit.* § 1520. But, since a subsequent mortgagee has not this remedy, being the holder of an equitable interest only, less proof is necessary to entitle him to the appointment of a receiver. *Cortleyeu v. Hathaway* (1855) 11 N. J. Eq. 39. In a lien jurisdiction, where the mortgagee has no right to the property except by foreclosure, courts of equity have been uniform in permitting the appointment of a receiver upon the same equitable considerations. *Marshall, etc., Bank v. Cady* (1899) 75 Minn. 241, 77 N. W. 831; *Schreiber v. Carey* (1880) 48 Wis. 208, 4 N. W. 124. This rule has also been applied where a subsequent mortgagee has been more diligent than the prior incumbrancer in securing this relief. *Kroehle v. Ravitch* (1911) 148 App. Div. 54, 132 N. Y. Supp. 1056. The subsequent mortgagee obtains a specific lien on the rents collected, superior to any claim of the prior mortgagee, to be applied in paying off the debt of the one for whose benefit the receiver was appointed. *Ranney v. Peyser* (1880) 83 N. Y. 1; *Goddard v. Clarke* (1908) 81 Neb. 373, 116 N. W. 41. Although the prior mortgagee may upon motion have the receivership extended for his own benefit, until this is done the receiver is accountable only to the subsequent mortgagee. *Ranney v. Peyser*, *supra*. Therefore, the principal case seems to have been decided in accord with the authorities on this point.

MORTGAGES—WAIVER OF DEFAULT AFTER ACCELERATION OF MATURITY—AUTHORITY OF APPOINTEE OF COURT.—The defendant guaranteed the payment by the principal debtor of certain mortgage bonds. The principal debtor defaulted in paying interest and thus accelerated the optional maturity of the bonds. The plaintiffs, owners of the bonds, secured judgment against the guarantor for the amount of the prin-

cipal and interest. Meanwhile, by order of court, the bonds had been deposited temporarily with a "trustee", who under the order was directed to allow the action against the guarantor to proceed, but to take no other action upon the bonds. After judgment against the guarantor the "trustee" accepted payment of all the interest due, and thereupon the guarantor sought to be relieved from the judgment. *Held*, the guarantor was not entitled to relief. *Pomeroy v. Hocking Valley Ry.* (App. Div. 1st Dept. 1918) 59 N. Y. L. J. 201.

An acceptance of overdue interest after the maturity of the principal has been accelerated by the default waives the right to collect the principal immediately, *Lawson v. Barron* (N. Y. 1879) 18 Hun. 414; see *Rathbone v. Forsyth* (1916) 171 App. Div. 26, 156 N. Y. Supp. 888, and, therefore, such an acceptance by the creditor is, in effect, an extension of the time of payment. An extension of time given the principal debtor discharges the surety, 1 Brandt, *Suretyship & Guaranty* (3rd ed.) § 376, even if judgment has already been given against the surety. *Gipson v. Ogden* (1885) 100 Ind. 20; cf. *Malanaphy v. Fuller & Johnson Mfg. Co.* (1904) 125 Iowa 719, 101 N. W. 640. In order, however, that such a payment of interest have the effect of restoring the original time of maturity, it is necessary that it be made to a person authorized to receive it. Cf. *Grussy v. Schneider* (N. Y. 1875) 50 How. Pr. 134. While, in the instant case, the custodian of the bonds is designated as a "trustee" and while a trustee, being the holder of the legal title, would have authority to waive the default, the description of the holder as a "trustee" is not conclusive, 1 Mechem, *Agency* (2nd ed.) § 43, and the real status of the holder may be made the subject of inquiry. Therefore, it seems that the possessor of the bonds was a mere agent of the court, cf. *Perkins v. Dwight* (1873) 4 S. C. 360, and had no authority to waive the default. Therefore, the payment was not binding upon the creditor, *Smith v. Kidd* (1877) 68 N. Y. 130, and since there was no valid extension of time, cf. *Karcher v. Gans* (1900) 13 S. D. 383, 83 N. W. 431, the surety was not released.

PARTNERSHIP—ACTION BETWEEN PARTNERS.—The plaintiff filed a bill for the dissolution of a partnership, an accounting, and a decree for one-half of the cost of machinery which the plaintiff had installed at his own expense and which the defendant had agreed to repay either out of his individual funds or out of the profits of the partnership. *Held*, only a decree for the balance due upon a general accounting could be had. *Jones v. Rose* (W. Va. 1917) 94 S. E. 41.

One partner may maintain a common law action against his co-partner for damages for breach of a promise to furnish capital. *Lindley*, *Partnership* (8th ed.) 632; *Fenning v. Leckie* (1810) 13 East 7; see *Brown v. Tapscott* (1840) 6 Mess. & W. 118, or to repay an advance of capital. *Bates*, *Partnership* §§ 875, 876; see *Smith v. Kemp* (1892) 92 Mich. 357, 52 N. W. 639. In the instant case the plaintiff could not have maintained such an action since the defendant by his promise had an election to repay the plaintiff out of his share of the profits, the determination of which would have necessitated an accounting. Instead, the plaintiff asked for a dissolution and a final accounting. Where such relief is sought a personal decree in favor of one partner will only be rendered for the amount found due from the other partner upon a complete settlement of all partnership affairs. *Mackenna v. Parkes* (1867) 36 L. J. Ch. (N. S.) 366; *Bates*, *op. cit.*

§ 971; *Green v. Stacy* (1895) 90 Wis. 64, 62 N. W. 627. It would seem, therefore, that the decision in the principal case is correct.

REMOVAL OF CAUSES—FEDERAL EMPLOYERS' LIABILITY ACT.—The plaintiff sued the defendant under the Federal Employers' Liability Act, which, by the amendment of 1910, prohibits the removal to a federal court of a suit once started in a state court. The plaintiff, having failed to make out a case under the Act, was allowed a recovery on common law principles. On a subsequent motion for removal by the defendant on the ground of diversity of citizenship, *held*, the case could not be removed. *Great Northern Ry. v. Alexander* (U. S. Sup. Ct. Oct. Term 1917, No. 130, March 4th, 1918).

It was formerly held that the Amendment of 1910 (36 Stat. 291) to the Federal Employers' Liability Act (35 Stat. 65) was not intended to prohibit the removal of cases, otherwise removable on grounds of diversity of citizenship. *Van Brimmer v. Texas Pac. Ry.* (C. C. 1911) 190 Fed. 394. This view has been overruled, so that now a cause of action cannot be removed either on the ground of diversity of citizenship or because it arose under a law of the United States. *Kansas City, etc., Ry. v. Leslie* (1914) 238 U. S. 599, 35 Sup. Ct. 844; see 15 Columbia Law Rev. 615. The purpose of this Amendment, apparently, is to favor an injured servant by giving him the right to choose the forum for his action. See *Hulac v. Chicago & Northwestern Ry.* (D. C. 1912) 194 Fed. 747. In the case at hand the defendant's contention that the action became removable because the plaintiff failed to prove a case under the Federal Employers' Liability Act is not supportable. The general rule relating to statutory removals from state to federal courts is that the right to remove depends on the plaintiff's pleadings alone. *Alabama Great Southern Ry. v. Thompson* (1906) 200 U. S. 206, 26 Sup. Ct. 161. The fact that a plaintiff in stating his claim alleged facts important only as a defense to anticipated allegations of the defendant, which facts would ordinarily be grounds for removal, will not make the case removable. *Taylor v. Anderson* (1914) 234 U. S. 74, 34 Sup. Ct. 724. The same result is reached where the petition for removal denies allegations in the complaint, *Chesapeake & Ohio Ry. v. Cockrell* (1913) 232 U. S. 146, 34 Sup. Ct. 278, or alleges new facts which, if incorporated in the complaint, would have made the case removable. *Chappell v. Waterworth* (1894) 155 U. S. 102, 15 Sup. Ct. 34. Even a finding by the court that there was no evidence to support allegations of the plaintiff which were necessary to prevent removal is not sufficient. *Kansas City, etc., Ry. v. Herman* (1902) 187 U. S. 63, 23 Sup. Ct. 24; but see *Texas & Pac. Ry. v. Cody* (1897) 166 U. S. 606, 17 Sup. Ct. 703. But if it can be shown that the plaintiff put allegations into his complaint fraudulently to deprive the defendant of his right to a federal trial, see *Southern Ry. v. Lloyd* (1915) 239 U. S. 496, 36 Sup. Ct. 210, or if he voluntarily amended his original pleadings, *Powers v. Chesapeake & Ohio Ry.* (1898) 169 U. S. 92, 18 Sup. Ct. 264, the case will become removable. The principal case is thus fully supported by authority.

TAXATION—CORPORATION EXCISE TAXES—INCOME.—A joint-stock insurance company adopted the practice of charging premiums exceeding the cost of insurance and holding the excess for policyholders, as so-called "dividends", which, unless withdrawn by the

policy-holder, could be used to reduce renewal premiums or secure additional insurance. *Held*, the amounts so applied should not be added to the company's gross income in the calculation of the taxable net income under the Corporation Excise Tax of 1909. *Prudential Ins. Co. of America v. Herold* (D. C. D. N. J. 1918) 247 Fed. 681.

By the statute of 1909, imposing a tax on the net income of insurance corporations, it is provided that dividends paid to policy-holders shall not be deducted from the gross income in determining the net income. 36 Stat. 112, c. 6, § 38. The practice of mutual insurance companies is to stipulate for a premium in excess of the actual cost of insurance, and to allow the policy-holder at the end of the year to withdraw this over-payment, collected in a so-called "dividend-fund", in cash, or to have it applied in the reduction of future premiums or in the purchase of additional insurance. See *Mutual Benefit Life Ins. Co. v. Herold* (D. C. 1912) 198 Fed. 199. If the insured withdraws the "dividend" in cash, and later pays the second premium in full, the gross income of the company is represented by the full amounts of the premiums, and the "dividend", i. e., the overpayment returned, cannot be deducted in calculating the taxable net income. See *Mutual Benefit Life Ins. Co. v. Herold*, *supra*. Where, however, the overpayment is applied to reduce the amount of the renewal premiums, the gross income of the company for the following years is only the amounts of the reduced premiums paid by the insured, *Mutual Benefit Life Ins. Co. v. Commonwealth* (1908) 128 Ky. 174, 107 S. W. 802, and no question of any deduction from the so-called "dividends" arises. A similar result is reached where the overpayment is applied to the purchase of additional insurance since the company receives no further payments to augment its gross income. *Connecticut General Life Ins. Co. v. Eaton* (D. C. 1914) 218 Fed. 188, *aff'd* 223 Fed. 1022. The instant case in holding that the overpayment fund, although applied in either manner, could not be taxed as "income received", would appear sound on principle, and is fully supported by authority. *Connecticut Life Ins. Co. v. Eaton* (D. C. 1914) 218 Fed. 206, *aff'd* 223 Fed. 1022; *Mutual Benefit Life Ins. Co. v. Herold*, *supra*.

WILLS—INVALID DEVISE—REPEAL OF STATUTE—REPUBLICATION BY CODICIL.—Testatrix made a will containing a devise which was invalid because of a statute against perpetuities. After the repeal of the statute she executed a codicil confirming the will. *Held*, the invalid devise was validated by the codicil. *Morse v. Ward* (Conn. 1918) 103 Atl. 119.

According to the weight of authority, the disposition of property in a will is governed by the law existing at the time of the execution, and hence, a statute passed after the execution of a will, but before the testator's death, is held not to affect the disposition made in the will. *Attorney General v. Downing* (1769) Dick. 414; *Taylor v. Mitchell* (1868) 57 Pa. 209; *contra*, *Blackbourn v. Tucker* (1895) 72 Miss. 735, 17 So. 737. The effect of a codicil confirming a will, however, is to republish the latter, bringing it down to date, and making it speak as if executed at the time of the republication. 1 Williams, Executors & Administrators (10th ed.) 147; *Matter of Campbell* (1902) 170 N. Y. 84, 62 N. E. 1070; *Gilmor's Estate* (1893) 154 Pa. 523, 26 Atl. 614; *Stone v. Forbes* (1905) 189 Mass. 163, 75 N. E. 141. For instance, the republication of a contingent will

after the contingency has failed establishes it as an unconditional will; see *In re Forquer's Estate* (1907) 219 Pa. 331, 66 Atl. 92; and the republication of a will revoked by operation of law, renders the will valid. *Brown v. Clark* (1879) 77 N. Y. 369. Hence, according to the better view, if a will is made before and a codicil after the passage of a statute, the effect of republication is to render the construction of the will subject to the statute. *Brimmer v. Sohler* (1849) 55 Mass. 118; *Ayres v. The Methodist Church, etc.* (N. Y. 1848) 3 Sandf. 351; *contra*, *Harrison's Estate* (1901) 10 Pa. Dist. 45. Thus, the principal case seems sound in holding that a devise, invalid when the will was executed because of a statute, was validated by the republication of the will after the repeal of the statute. *Eaton v. Eaton* (1914) 88 Conn. 286, 91 Atl. 196.

BOOK REVIEWS.

ORVILLE W. WOOD, *Editor-in-Charge.*

HANDBOOK OF CRIMINAL PROCEDURE. By WILLIAM L. CLARK, JR. Second Edition. By WILLIAM E. MIKELL. St. Paul: WEST PUBLISHING Co. 1918. pp. xi, 748.

This Handbook of Criminal Procedure is a work by the author of Clark on Contracts and Clark on Criminal Law, the second edition of the book being edited by Professor Mikell of the Law School of the University of Pennsylvania. The book is one of the "Hornbook Series".

The term "procedure" is one that may be made to include more or less, according to the fancy of the particular author in preparing his book. In this "Handbook", the term is used in its widest sense, and includes the whole criminal adjective law—that is, process, pleading, trial (including verdict and judgment), evidence, and also a brief treatment of *habeas corpus*.

Where so much is dealt with in a limited space, much must be dealt with briefly. Sometimes this results in the simple assertion of much that is theoretically debatable. Thus on page 13, the doctrine of "continuing trespass" in larceny is stated as a proposition of law, without calling attention to the difficulty of one's first assuming possession of a thing, and then committing a continuing trespass on his own possession. Still, there are good practical reasons for this brevity, since the work contemplates mainly a statement of the law as it is, without an extended discussion of reasons.

Within these necessary limitations, the work is an excellent one. In the portions devoted to criminal process and pleading, the statement of the law is unusually clear and concise. Thus in the sections relating to the law of arrest, the correct doctrine as to the amount of force that may be used in arresting a misdemeanor is stated, namely, that all necessary force may be used in making the arrest, even if the misdemeanor be killed. The distinction between the right to kill in putting down resistance to an arrest,—a right which must exist if the law is to be properly enforced,—and the right to kill a fleeing misdemeanor who has got away from the control of the arresting officer, is one that has caused much discussion, and the statement of the law in this book accords with the position rightly taken by Bishop (1 Bishop, New Crim. Proc. (2nd ed.) § 160).

In this portion of the book, the various meanings of the words "complaint" and "information" are clearly and correctly explained. Some writers fail to bring out the distinction between the function of a complaint or information as an affidavit necessary to secure a warrant, and their functions when used as an accusation of a crime before a magistrate. In many jurisdictions the term "complaint" is applied only to the affidavit necessary to secure a warrant, while the term "information" is applied to a written accusation of a crime preferred by a prosecuting officer to a court. It is interesting here to observe that in New York all such sworn accusations of crime are called informations, there being an information for a warrant, and also for a crime. N. Y. Code Crim. Proc. § 145; Cook's Penal Law (1917) pp. 557 *et seq.*

On page 553, it appears that the ancient demurrer to evidence has still some life left in it in criminal practice, although "it is seldom taken". On the effect of the plea of "not guilty", it is stated (page

473) that in criminal actions matters of justification or excuse may be shown under the general issue, and attention is called to the interesting fact that under "not guilty" one may show that the action is barred by the Statute of Limitations, and that the Statute need not be specially pleaded as in civil cases.

In dealing with the subject of criminal evidence, the subdivision relating to the "acts and declarations of conspirators" is a clear and good piece of work. Here the analogy between the declaration of an agent in the scope of his authority and that of a conspirator in the course of a conspiracy is well stated, and the distinction is brought out between the declarations made while the conspiracy is in progress, and those which are made after it is over, which are excluded as mere unauthorized narration.

In the black-letter heading relating to "confessions" (page 621), the author follows the language of Stephen (Dig. Ev. Art. 21), stating that "A confession is an admission made at any time by a person charged with crime, stating or *suggesting the inference* that he committed the crime, and is admissible against him if voluntary". It is submitted that the phrase "or suggesting the inference" is an unfortunate one, inasmuch as a confession is a direct admission of guilt; it is clear that admissions of facts that merely tend to prove guilt are not confessions, and are not governed by all the rules excluding confessions as involuntary. See *State v. Picton* (1899) 51 La. Ann. 624; *People v. Le Roy* (1884) 65 Cal. 613. Again, it is unfortunate that only the common law rule as to the admissibility of confessions is given, omitting the New York statute which provides that a confession is admissible unless obtained by fear or threats or by the stipulation of the district attorney not to prosecute therefor; not, as at common law, rendering the confession as inadmissible if obtained by a promise of any favor made by one in authority in reference to the conduct of the case.

On page 634, we have the heading "Presumption of Innocence—Burden of Proof". It may be doubted whether the term "presumption of innocence" serves any purpose in criminal procedure that is not already served by the term "burden of proof". Since the State asserts the prisoner's guilt, of course the State must prove it; but this is merely an application of the rule that he who asserts must prove. In general, the duty of proceeding with evidence goes with the burden of establishing a proposition, unless there be some presumption in favor of the party who has the latter burden. However, anyone may be pardoned for reiterating such a venerable phrase as "the presumption of innocence".

The author's treatment of the topic of "burden of proof" is commendably clear and modern. He recognizes the distinction elucidated by the late J. B. Thayer between the burden of establishing a proposition and the burden of going forward with evidence, and he gives concise and accurate illustrations of each use of the term "burden of proof". The various rules fixing the burden of proof in insanity cases are correctly set forth, and the author calls attention to the conflict between the rule of pleading, which allows the existence of insanity to be shown under a plea of "not guilty", and the other rule of procedure in most jurisdictions which treats insanity (though shown under "not guilty") as an affirmative defense to be proved by a preponderance of all the evidence, or, still worse, beyond a reasonable doubt. If sanity is a necessary element of guilt, it seems clear that, apart from a statutory rule to the contrary, the State should have to prove sanity beyond a reasonable doubt. It may here

be stated that the case of *State v. de Rance* (1882) 34 La. Ann. 186, cited on page 637 as representing the law of Louisiana, has now been overruled, Louisiana now requiring insanity to be proved, not beyond a reasonable doubt, but merely by a preponderance of the evidence. *State v. Lyons* (1904) 113 La. 959, 987.

The author is to be congratulated on making clear the distinction between the relevancy and the competency of evidence, and on showing that there is much evidence that is entirely relevant in the sense of having a logical bearing on the issue, which may be entirely inadmissible. On the whole, the subject of criminal evidence is as well treated as could be expected in so small a compass.

It can justly be said of the book that it will prove a useful one both for practitioner and student. It has the limitations of all synopses of many details, and one cannot expect to derive from such a book much depth of understanding unless he supplements it by a study of the original decisions on which it is based. Nevertheless, the book is a good and competent guide through a technical field where guidance is always needed.

Ralph W. Gifford.

GUIDE TO THE LAW AND LEGAL LITERATURE OF ARGENTINA, BRAZIL, AND CHILE. By EDWIN M. BORCHARD. Washington: GOVERNMENT PRINTING OFFICE. 1917. pp. 523.

All nations of Latin America are characterized by a well-defined peculiarity. While in the relations of private law they cling to the ancient Roman law, resisting all innovations of modern life, they have, in public relations, adopted—*mutatis mutandis*—the constitutional institutions of the United States of America. Thus, while the study of private law has in general found, except, perhaps, in Brazil, but few cultivators, although proficient lawyers of uncommon merits have been produced, that of public law has developed to such an extent as to form a literature both copious and of the first order. This is due to the fact that, while in private relations society has kept to a primitive agricultural form,—only later following the path of active commercial life, without having, however, even at this time, a real and great industry to boast of,—in the fields of public activities, on the contrary, since the first years of independence of the several republics, the struggle between the people aspiring to liberty and the successive tyrants who wished to retain their power by all means has awakened a great love for the study of constitutional law, attracting to it the best intellects.

Argentina, Brazil, and Chile, whose juridical evolution the author of this book has studied with great knowledge of the subject, have each had distinct origins. Argentina, after freeing herself from Spanish bondage in 1810, followed a path of agitations which had as their principal aim the winning of public liberties. Brazil, having severed the ties that united her to her mother country, was raised, by determination of the kings of Portugal themselves—since Dom Joao, escaping from Napoleon's troops, took refuge in his colony and later proclaimed himself its king,—to the dignity of a nation, and from that time the only political aim of the new state was the maintenance of order. Chile organized herself into a republic, but only in name, as for many years she submitted to a legal dictator. The principles of American liberty and constitutional order nevertheless now form the solid basis of public life in those three countries.

However, their distinct political origins gave rise to different tendencies in private law. Brazil, which, during Dom Pedro's reign,

had enjoyed a long peace without political agitations and had as her only aims the maintenance of the existing order of things and the respect of classes and castes, allowed slavery to continue within her boundaries until the year 1888, and did not adopt the Civil Code until the first day of January, 1917, although this had been prepared a long time before. On the other hand, while the legislative reforms were progressing so slowly, there arose, as though representing a protest of the national juridical spirit, the great students of private law, possibly the most powerful of whom Latin America can ever boast. Another contradiction, which only the political history of that country can explain, is that, while civil legislation was all in a tangle, as it was, following the so-called "Codigo Philippino"—a digest of old Portuguese laws,—a Code of Commerce had been compiled, it being the first American code, because, although before 1850, the year of its promulgation, there existed other codes, such as the Haitian of 1826, that of Paraguay of 1834, and that of Santo Domingo of 1845, the first and last ones were but reproductions of the French Civil Code and the second of the Spanish Civil Code.

Chile had her Civil Code in 1857. It followed the principles of the French Code in a large number of articles, but it was drafted in a masterly manner and with broad views. The principle of equality of rights for both citizens and foreigners with regard to civil laws for the first time found its application in this Code.

Argentina did not collect her civil laws into one code until after Chile, in 1871, notwithstanding the fact that the constitution of 1853 had directed the public authorities to frame it as quickly as possible. This Code is the largest we know, for it contains 4,051 articles, and it was compiled with more consideration for the juridical literature of Europe than the previous laws of the country. It is therefore mostly theoretical.

In those countries where the Roman law still predominates, civil legislation forms the basis of all private relations and is therefore an adjunct and subsidiary to all other codes or laws. Hence the great importance of the Civil Code.

One identical phenomenon we find in these three nations, namely, that the codification of civil legislation was virtually the work of a single jurist in each country: Dr. Velez Sarsfield in Argentina, Dr. Texeira de Freitas in Brazil, and the famous writer Andres Bello in Chile. The Civil Code presented by Velez was neither discussed nor amended by the legislative chambers, and this was the cause of all its deficiencies.

Commercial legislation falls short of the requirements of our commercial and industrial times. True it is that all matters affecting corporations, neglected until recently, are now becoming the subject of amendment in the Codes of Commerce, but the problems of the strenuous life of business have not yet been attacked with the vigor which their importance demands. In this respect Latin America generally follows in the scientific footsteps of France, Italy, and Spain, which are rather tardy in this kind of legislation.

Notwithstanding the federal, or quasi-federal, systems of Argentina and Brazil, the basic legislation of each applies uniformly to the entire nation. The laws of procedure, on the other hand, vary in the different states of Argentina, and the administrative legislation varies in both countries.

The author has made a brief but clear exposition of the subject and has furnished a great help to the student who contemplates a work of investigation. The whole legislation is summarized, special

laws are brought to notice, and their sources clearly traced. The works published on the subject have been diligently catalogued, and the author has sometimes been led by his own scrupulosity to quote even publications of very limited importance.

However, if we were allowed to make a remark on this diligent "Guide," we would say that a little critical study on the part of the author would not have been out of place. He then would have taken those among his readers who are not familiar with the subject through more definite paths, and above all this very useful book of his would have assumed a more scientific character and one which it really deserves, since this publication has fulfilled that worthy task which we presume the author had taken upon himself to perform.

Orestes Ferrara.

REPORTS OF THE AMERICAN BAR ASSOCIATION. Vol. XLII. 1917. Baltimore: LORD BALTIMORE PRESS. pp. 970.

This volume presents the picture of the American Bar Association at work. The papers which it contains are naturally of uneven merit and interest. M. Gaston De Leval's restrained but graphic recital of "Prussian Law As Applied in Belgium" deepens our sympathy and our indignation. Its quiet moving power presents a welcome contrast to the oratorical striving for effect which characterizes Professor McElroy's speech on "The Representative Idea and the War." Mr. Hampton L. Carson's essay on the great figures in legal scholarship contains the charm and learning with which his other writings have made us familiar. The sane and vigorous address of Mr. Hughes on "War Powers Under the Constitution" deserves reading and heeding by those who would exalt the theories of states rights and of *laissez faire* in war time. The report of the Committee on Noteworthy Changes in Statute Law continues the valuable summaries of recent legislation which Mr. Parkinson has given us for several years. Professor Cook's plea for the improvement of legal education and of standards for admission to the bar deserves more attention from the profession than it is likely to receive.

Miss Claghorne's study of "Crime and Immigration" is easily the most scientific contribution in the volume, as the addresses of Senator Hardwick and of President Sutherland are the least. Miss Claghorne's careful array and analysis of concrete conditions disclosed by a clinical examination of immigrants admitted to Sing Sing prison contrasts strikingly in method with the fulminations of Senator Hardwick against congressional interdiction of interstate commerce in lottery tickets and the products of child labor, and with Ex-Senator Sutherland's Jeremiad against legislation in general. The Lottery Case, says Senator Hardwick, is "the most unsound of all the decisions of the great court that pronounced it, . . . productive of more harmful and dangerous results . . . than any judicial pronouncement in all our history save, perhaps, one" (page 220). "How much longer," he inquires, "can our wondrous dual system of government . . . withstand these persistent attacks, these insidious assaults upon its integrity?" (page 224). One misses in the Senator's speech the delight which might have been given by a not too extravagant use of the gentle art of under-statement.

A few excerpts will convey President Sutherland's message. "We have developed", he says, "a mania for regulating people" (page 201). The mania is on the increase. "Never before have the business activities of the people been so beset and bedevilled with vexatious statutes, prying commissions, and governmental intermeddling of

all sorts" (page 198). "I cannot imagine", he adds, "any greater misfortune to the people than for the general government to acquire and operate the telegraph, telephone and railroad lines of the country" (page 210). And there are Philippias against the Ship Purchase Bill, the prohibition of the private use of intoxicants, and the conferring of wide powers on the Federal Trade Board.

The annual complaints of lawyers against the volume of legislation are beginning to lack the charm of novelty. They began before 1601 when *Twyne's Case* was decided by the judges of the Star Chamber. For the complaint was familiar then, when answer was made as follows:

"To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

*'Quaeritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.'*"

After three hundred years, is it not time that the leaders of our bar associations, when they consider the volume of legislation, give some thought to what, besides *dolus*, is increasing in the world to give rise to such legislation, and cease to content themselves with perennially chanting the ancient laments? Undoubtedly much of our legislation is unwise. We should naturally look to the bar for discriminating and helpful guidance in sifting the tares from the wheat. But such guidance will not come from men whose public addresses disclose no effort or capacity to understand the changing conditions that prompt legislators to meet real or fancied evils with new expedients. It is only because the address of the president of the American Bar Association in 1917 is in such complete unison with what bar associations year after year are hearing and applauding, that it is worthy of serious attention.

Thomas Reed Powell.

LEGAL REASONING AND BRIEFING. BY JESSE FRANKLIN BRUMBAUGH. Indianapolis: BOBBS-MERRILL COMPANY. 1917. pp. xvi, 775.

The title as well as the preface suggest a work confined in large part, if not exclusively, to the more austere and difficult phases of logic as applied to law, with particular reference to the preparation of written briefs. In this respect, Mr. Brumbaugh affords his readers a very pleasant surprise, as he has blended together, on the one hand, a treatment of logic and the rules of briefing, such as the title suggests, and also a wealth of interesting and attractive material, having a much wider application and covering in large measure the entire relations of the average lawyer with his clients, his witnesses, his opponents, and the court, in reference to matters of litigation. The result is a very happy one, in that it is made possible for the reader to cover some exceedingly difficult ground in a very thorough manner but without that feeling of mental exhaustion which might naturally be expected to follow the close study of the rules of logic as applied to legal concepts.

The second chapter, however, which treats the subject of deductive reasoning, is rather pedagogic and contains such terse and sometimes cryptic statements of the essential rules of logic that it will doubtless prove difficult and labored reading for a person not already quite familiar with the fundamentals of logic. Additional illustration and examples would probably have made this chapter much more useful

and readable. It is only when the author after having stated the rules proceeds to describe the process of inductive reasoning, in Chapter 3, that the true character of the book and its combination of the elements above referred to are first appreciated. The discussion of the various forms of argument and the methods of their refutation is exceedingly well done and lays a solid foundation for any sound comprehension of the true principles of brief making.

Taken as a whole, this work is an admirable introduction to the case system and to the practice of law in all its phases relating to court matters and litigation. The enumeration of the values of cases and law books generally, to which a separate chapter is devoted, should of itself prove invaluable to the student groping about through the various reported cases, text books, and encyclopedias to find the authority which is to sustain or defeat the given proposition of law in which he is interested. The chapters on "Estimating Witnesses," "Estimating the Jury," and "Estimation of Delivery" are exceptionally well prepared. They cover the ground thoroughly and in systematic fashion and at the same time vividly portray the details of preparation for court work in such a way as to create a lasting impression.

The second part of the book is devoted to "Legal Briefing", and it is apparent that the author has in mind the methods of briefing usually employed in courts where main importance is attached to the oral argument and the brief is merely for the purpose of concisely and logically presenting the legal points of each side in the case. As a matter of analysis, Mr. Brumbaugh had undoubtedly sketched a thoroughly practical method of briefing, which, if properly followed, will eliminate many of the glaring faults of brief-writers which have been so generally condemned by the courts.

As a practical matter, however, particularly when dealing with courts whose calendars are overcrowded and who can retain but faint impression and recollection of the oral argument, it is probable that some departure from Mr. Brumbaugh's ideal brief is desirable. Theoretically, of course, the courts are supposed to subordinate "emotional elements strictly to intellectual consideration;" but, after all, courts are human, and a little humor and "coloring matter" here and there are almost indispensable. The brief should be prepared in attractive form so that its perusal is made more pleasurable, and some reference to "emotional" or "social" considerations is very effective as a means of making strictly legal and technical points more impressive.

As stated by the author in his preface, he has blazed a new trail in the wilderness of law books and one which is bound to assume in time very considerable importance. The cursory study of elementary logic which the average student makes in his college or law school curriculum is not sufficient.

Harold R. Medina.

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